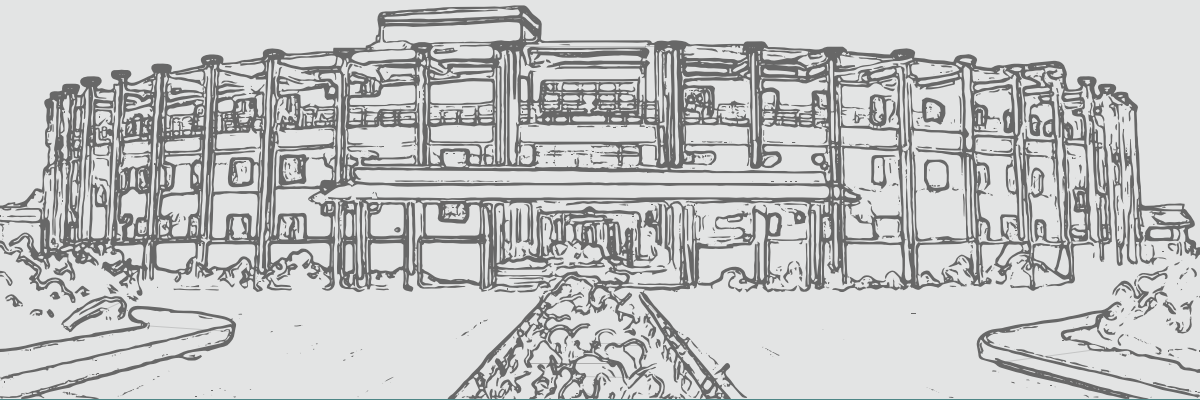


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# HNLU Student Law Journal



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# **HNLU Student Law Journal**

**(HNLU SLJ)**

A Bi-annual Peer Reviewed Journal Published by

**HNLU Press**

(A Media Division of Hidayatullah National Law University)



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## **A Techno-Legal Perspective on the Urge to Have Global AI Safety Measures**

### **Abhivardhan**

Chairperson & Managing Trustee, Indian Society of Artificial Intelligence & Law.

### **Abstract**

The meetings that had happened in the G7 Hiroshima Summit under the leadership of the US, and the AI Safety Summit conducted under the tutelage of UK PM Rishi Sunak clearly show a stark aspect of how governments and multinational companies have this unending and paradigmatic urge to regulate AI by enacting or enforcing some “global” AI safety measures. While the intentions are founded on solid grounds, there are certain meticulous aspects of AI governance, which are yet not properly address in certain key white papers, declarations, so-called legal instruments, and policy recommendations at three levels – (1) governments (domestic); (2) intergovernmental institutions; and (3) minilateral / bilateral forums (like the QUAD, I2U2, GPAI etc.). This analysis has focused on offering a clarified and informed techno-legal perspective on the problems with such an urge to have global AI safety measures, by addressing some of the most important AI-related law & policy recommendations, documents & instruments.

### **Keywords**

Artificial intelligence, techno-legal, international law, anthropomorphization.

## **Common Problems Yet Require Differential Solutions**

There is no doubt that AI by itself is a unique class of technology. As discussed in the **2020 Handbook on AI and International Law**<sup>1</sup>, and the **2021 Handbook on AI and International Law**<sup>2</sup>, AI, from an ontological perspective, has a set of characteristics, which are commercially practical as well as technically discernible. Those set of characteristics include:

- Omnipresence
- Omnipotence
- Anthropomorphization
- Naturalization
- Enculturation
- Fungibility or manifested presence.

### **Omnipresence**

Omnipresence in the context of AI extends beyond its literal meaning, which implies to emphasize the widespread application of AI tools. From a legal perspective, omnipresence raises concerns related to anti-competitive practices and market manipulation. A better way to exemplify this may involve an AI-driven pricing algorithm used by multiple e-commerce platforms.

Now, pricing algorithms, are a common tool employed by e-commerce platforms to dynamically adjust

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<sup>1</sup> Abhivardhan, et. al (ed), *2020 Handbook on AI and International Law*, (Indic Pacific Legal Research, 2022).

<sup>2</sup> Abhivardhan, et. al (ed), *2021 Handbook on AI and International Law*, (Indic Pacific Legal Research, 2022).

product prices based on real-time market conditions. These algorithms, often driven by sophisticated AI models, can instantaneously analyze vast amounts of data, including competitor pricing, customer demand, and supply chain dynamics. This is why the ubiquity of AI-driven pricing algorithms across multiple e-commerce platforms raises questions about their collective influence on market prices. While these algorithms are designed to optimize pricing for individual platforms, their widespread adoption could lead to coordinated pricing behavior, effectively cartelizing the market, and diminishing consumer choice.

Antitrust regulators worldwide are increasingly scrutinizing the potential anticompetitive effects of AI-driven pricing algorithms. In **2021**, the US Department of Justice (“DOJ”) had filed a **civil antitrust lawsuit** against a major technology company, with an allegation that the company has used algorithms in order to stifle competition in the online retail market, in the US. The DOJ's complaint highlighted the company's use of algorithms to track and match competitor prices, effectively preventing other retailers from lowering their prices and attracting customers. The omnipresence of this algorithm raises questions about its influence on market prices, prompting antitrust regulators to scrutinize its impact on fair competition.

## **Omnipotence**

The notion of AI as possessing an omnipotent character, signifying an unrestrained dominion over power and authority, transcends mere speculative discourse. AI systems have, in diverse domains, exhibited extraordinary capacities, thereby instigating apprehensions pertaining to prospective misuse and malevolent exploitation. Within the legal sphere, the conceivable omnipotence of AI precipitates pivotal inquiries concerning regulatory

supervision and the imperative for safeguards to preserve individual rights and liberties.

Contemplate, for instance, the paradigm of AI-driven predictive policing systems, endeavors characterized by the anticipation and thwarting of criminal activities through the analysis of extensive datasets, encompassing historical crime records, social media engagements, and sensor-derived information. While the manifest advantages of these systems are incontrovertible, their omnipotent surveillance capabilities give rise to substantial disquietude concerning infringements upon privacy and the potential propagation of biases.

The omnipotence inherent in AI-driven predictive policing systems begets the potential diminution of individual privacy entitlements. The faculty to incessantly scrutinize the activities of individuals and prognosticate prospective criminal conduct therein harbors a chilling effect upon the realms of free expression and association. Furthermore, the datasets underpinning these systems are susceptible to latent biases, engendering discriminatory profiling and the unjust targeting of specific demographic cohorts<sup>3</sup>.

Legal frameworks necessitate adroit calibration to contend with the prospect of overreach posed by AI-driven predictive policing systems. Articulate directives pertaining to the collation, retention, and utilization of data become indispensable to obviate unauthorized surveillance and to fortify the protection of individual privacy prerogatives. In tandem, the establishment of mechanisms imbued with accountability and transparency is imperative to forestall

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<sup>3</sup> Michael C Horowitz and others, 'Strategic Competition in an Era of Artificial Intelligence' (Center for New American Security, August 2018) <<https://cset.georgetown.edu/research/ai-safety-security-and-stability-among-great-powers/>>.

the deployment of these systems in a manner that unfairly singles out or discriminates against individuals.

The purview of regulatory oversight vis-à-vis AI-driven predictive policing systems must also extend to the potential sway exerted by these systems upon the decision-making echelons of law enforcement agencies. The integration of AI prognostications in shaping determinations regarding arrests, searches, and analogous law enforcement activities elicits concerns regarding the prospect of biases and the specter of excessive policing.

To palliate these risks, legal frameworks must proscribe the utilization of AI-generated prognostications as the solitary basis for law enforcement initiatives. Preferentially, such prognostications should be accorded due consideration as a constituent facet within a holistic decision-making continuum that underscores human discernment and adherence to due process. The conceivable omnipotence encapsulated within AI-driven predictive policing systems mandates a circumspect and judicious approach. While these systems portend augmented crime prevention capabilities, their implementation necessitates the imposition of robust safeguards to safeguard individual entitlements, uphold equitability, and sustain public confidence in the apparatus of law enforcement.

### **Anthropomorphization**

The contemporary proclivity toward the anthropomorphization of AI, denoting the ascription of human-like attributes to non-human entities, burgeons within the developmental trajectory of AI systems. Notably, social media platforms are increasingly availing themselves of anthropomorphized AI chatbots to engage users and furnish customer support. The infusion of human-like qualities into these chatbots affords a more intimate and

immersive user experience, notwithstanding that the capacity to simulate empathy and establish emotional resonance with users concurrently engenders legal apprehensions.

Foremost among these concerns is the latent exploitation by social media platforms of users' emotional vulnerabilities through the deployment of anthropomorphized AI chatbots. These entities may be tailored to target users experiencing sentiments of solitude or isolation, leveraging their simulated empathy to cultivate trust and manipulatively induce prescribed actions, such as divulgence of personal information or engagement with deleterious hyperlinks<sup>4</sup>.

Another apprehension is the prospective instrumentalization of anthropomorphized AI chatbots for the propagation of disinformation or propaganda. Conceived scenarios include the crafting and dissemination of spurious news articles or the impersonation of authentic individuals to disseminate divisive or malevolent rhetoric.

The custodianship of potential risks arising from the utilization of anthropomorphized AI chatbots behooves social media platforms to assume a mantle of responsibility. This obligation encompasses measures to preclude the manipulative exploitation of users and the propagation of misinformation or propaganda. Particularized strategies for mitigation include:

- *Transparency*: Social media platforms ought to exhibit transparency vis-à-vis the utilization of anthropomorphized AI chatbots, furnishing users with elucidation regarding their modus operandi and data collection practices.

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<sup>4</sup> Siméon Campos, 'Basic Safety Requirements for AI Risk Management' (OECD.AI, 2023) <<https://oecd.ai/risk-management>>.

- *Accountability:* Social media platforms bear responsibility for the actions of their anthropomorphized AI chatbots. The formulation of unambiguous policies and procedures for redressing grievances concerning chatbots, coupled with judicious recourse against those infringing platform terms of service, constitutes an imperative facet of accountability.
- *Human Oversight:* Social media platforms are enjoined to institute mechanisms of human oversight to ensure the judicious and ethical deployment of anthropomorphized AI chatbots. This may encompass human scrutiny of chatbot interactions or the formulation of algorithms attuned to the detection and flagging of potentially injurious or manipulative conduct.

## **Naturalization**

The concept of naturalization within the realm of AI pertains to its adept assimilation and seamless operation within a given milieu, imparting an illusionary sense of intrinsic belonging. This phenomenon, notwithstanding its potential for enhanced efficiency and automation, begets substantive legal apprehensions, particularly within the ambit of AI-driven decision-making systems employed by financial institutions.

Consider, for instance, a financial institution deploying an AI-driven decision-making system for the assessment of loan applications, allocation of investments, or management of risk. As this system progressively undergoes naturalization, autonomously rendering decisions sans explicit human intervention, the imperative arises to instantiate legal frameworks cogent to three cardinal facets: explainability, adaptability, and self-assessment.

- *Explainability:* The naturalization of AI-driven decision-making systems precipitates a dearth of transparency, thereby engendering a challenge for individuals and stakeholders to discern the rationale underpinning the system's decisions. This opacity raises apprehensions concerning fairness, accountability, and potential biases. To assuage this concern, legal frameworks ought to stipulate that financial institutions furnish lucid and comprehensible elucidation for AI-driven decision. Such explications should be tailored to the specific decision at hand, the individual subject to it, and the contextual backdrop within which the decision transpired.
- *Adaptability:* The financial landscape is perennially in flux, characterized by the emergence of novel trends, risks, and opportunities. Naturalized AI-driven decision-making systems must exhibit the capacity to assimilate these changes, thereby perpetuating their efficacy and ensuring that decisions align with extant market conditions and regulatory requisites. Legal frameworks should incent the development of AI systems imbued with the capability for perpetual learning and adaptation. This encompasses the facility to assimilate new data, discern nascent patterns, and modify decision-making algorithms commensurate with evolving circumstances.
- *Self-assessment:* AI-driven decision-making systems remain susceptible to biases, whether ingrained within the data employed for their training or emanating from the algorithms themselves. As these systems undergo naturalization, the imperative burgeons to institute mechanisms for self-assessment and the detection of biases. Legal frameworks should mandate that financial

institutions implement robust strategies for the detection and mitigation of biases within their AI-driven decision-making systems. This entails the regular auditing of system performance, meticulous assessments of potential biases, and the institution of remedial measures where exigent<sup>5</sup>.

## **Enculturation**

The imbuing of AI within the organizational echelons is metamorphosing the operational paradigms and modulating the cultural tapestry of workplaces. Notably, the ascendancy of AI-driven Human Resources (HR) tools is manifesting in the adaptation of work culture policies contingent upon employee interactions, proffering prospects of heightened efficiency, individualization, and data-centric decisional processes. Nevertheless, this interweaving of AI within the organizational fabric begets substantive legal concerns, thereby necessitating the formulation of robust legal frameworks adept at addressing the cultural ramifications intrinsic to AI.

- *Impact on Employment Laws:* AI-driven HR tools, serving as arbiters of workplace culture, must dutifully adhere to extant employment laws and regulatory mandates. These legal precepts encompass facets ranging from non-discrimination and equal opportunity to privacy and data protection. For instance, an AI-driven tool orchestrating the automatic allocation of work tasks or promotions based on employee interactions may engender apprehensions apropos potential discrimination grounded in race, gender, or other safeguarded attributes. Legal frameworks should meticulously ensure that AI-driven HR tools undergo development and implementation congruent with pertinent employment laws and regulations. This

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<sup>5</sup> OpenAI, "Our Approach to AI Safety," available at OpenAI.

necessitates the execution of thorough impact assessments, the establishment of perspicuous guidelines governing data collection and utilization, and the institution of mechanisms for the detection and amelioration of biases.

- *Discrimination and Ethical Standards:* AI-driven HR tools, by their very nature, possess the latent capacity to perpetuate or exacerbate extant biases within the workplace milieu. These biases may emanate from the data utilized to train the AI algorithms, the inherent design of the tools, or the manner in which they are operationalized within the organizational framework. Legal frameworks should meticulously grapple with the potentialities of discrimination and ethical transgressions intrinsic to the utilization of AI-driven HR tools. This necessitates the instauration of unambiguous ethical guidelines governing the development and utilization of AI in the workplace, the implementation of mechanisms facilitating employee input and feedback, and the cultivation of an environment underpinned by transparency and accountability.
- *Cultural Implications of AI:* The enculturation of AI within the workplace exerts a profound influence on cultural nuances. AI-driven tools, as architects of workplace norms, communication modalities, and decisional processes, have the potential to impact power dynamics, employee morale, and the very identity of the organization.

### **Fungibility or Manifested Presence**

The concept of fungibility in AI goes beyond mere interchangeability. It describes the ability of AI systems to adapt and tailor their functionalities based on the specific needs and contexts they encounter. This characteristic

holds immense potential for the healthcare sector, where AI systems hold the promise of personalized medicine, optimized resource allocation, and improved patient outcomes.

Consider the example of a single AI system utilized across various healthcare facilities. This system is capable of assisting with medical diagnosis, treatment planning, and patient monitoring. This system isn't a one-size-fits-all solution; it's fungible. It can adapt its functionalities and decision-making processes based on the specific needs of each medical facility it serves.

### **Facility 1: Rural Clinic**

In a rural clinic with limited resources, the AI might prioritize tasks like:

- *Triage and remote consultations:* Helping medical staff efficiently assess patient needs and connect them with specialists remotely, bridging geographical barriers to access.
- *Medical record analysis:* Analyzing patient data to identify potential health risks and recommend preventive measures, proactively addressing healthcare disparities in underserved areas.

### **Facility 2: Specialized Hospital**

In a specialized hospital with advanced equipment and expertise, the AI might focus on:

- *Surgical assistance:* Augmenting surgeons' capabilities by analyzing real-time data from medical equipment and suggesting optimal surgical procedures, improving precision and efficiency.

- *Drug development and research:* Assisting researchers in analyzing vast datasets to identify promising drug targets and accelerate clinical trials, leading to faster breakthroughs for complex diseases.

This presents a unique challenge for legal frameworks. How can we ensure that this fungible AI system complies with regulations and adheres to ethical standards in each diverse healthcare setting it encounters? Here are some key considerations.

### ***Regulatory Flexibility***

- *Context-specific compliance:* One-size-fits-all regulations may not suffice. Legal frameworks need to embrace a nuanced approach, allowing for flexible interpretations and adaptations based on the specific context of each healthcare facility. This could involve tiered compliance requirements or modular regulatory frameworks that cater to different types of facilities and patient populations.
- *Data governance:* Data privacy and security are paramount. Regulations should ensure that fungible AI systems adhere to robust data governance practices, with clear guidelines on data collection, storage, and usage tailored to the specific needs and risks of each healthcare setting.
- *Algorithmic transparency:* The "black box" nature of AI algorithms can raise concerns about explainability and accountability. Legal frameworks should mandate a degree of algorithmic transparency, allowing for independent audits and assessments of how the AI system adapts its decision-making processes within different contexts.

## ***Ethical Considerations***

- *Fairness and non-discrimination:* Fungible AI systems must be held to the highest ethical standards. Regulations should ensure that these systems are designed and deployed in a way that promotes fairness, non-discrimination, and equitable access to healthcare for all patients, regardless of their background or location.
- *Patient autonomy and informed consent:* Patients should retain control over their data and healthcare decisions. Legal frameworks need to address how fungible AI systems will interact with patients, ensuring informed consent and respect for patient autonomy even as the system adapts to different contexts.
- *Accountability and oversight:* Who is ultimately responsible for the actions of a fungible AI system? Legal frameworks should establish clear lines of accountability, identifying who is responsible for ensuring compliance, addressing potential biases, and mitigating harms that may arise from the system's adaptations.

In the next sections, using these phenomenological concepts of AI ethics, it is examined how governments have developed their urge to develop Global AI safety measures based on a set of legal frameworks proposed, or in force.

### **A Critical Analysis of the UNESCO Recommendation on the Ethics of AI**

In the epoch of AI, the clarion call for robust legal frameworks to navigate its expansive reach resonates with an urgency that demands our earnest consideration. The UNESCO Recommendation on AI, unveiled in 2021 (and

adopted in 2022), marks a commendable stride toward establishing a global ethical standard. Nevertheless, a meticulous scrutiny of this commendable initiative unveils its inherent limitations, leaving a lacuna in addressing the intricate legal ramifications posed by the distinctive traits of AI.

AI's omnipresence, an attribute defining its pervasive application across diverse sectors, raises formidable concerns, notably in realms of anti-competitive practices and market manipulation. While the Recommendation does nod to these concerns, its verbiage lacks the precision necessary for regulating the burgeoning domain of AI-driven pricing algorithms – an area increasingly under the watchful gaze of regulators.

The omnipotence of AI, denoting its formidable potential to autonomously execute intricate tasks, begets apprehensions over privacy violations and undue influence in sensitive domains like predictive policing. The Recommendation's commendable emphasis on human oversight, however, falters in furnishing explicit mechanisms for ensuring judicious and ethical deployment in contexts where discretion is paramount.

Anthropomorphization, the attribution of human-like qualities to non-human entities, ushers in its own legal quandaries. As AI chatbots evolve into sophisticated entities, the prospect of emotional manipulation looms large. The Recommendation, while paying homage to the sacrosanct nature of human dignity, inexplicably falls short in offering tangible safeguards against the potential exploitation of human emotions.

Naturalization, or the inherent knowledgeability of AI within a specific environment, spawns a thicket of legal intricacies. As AI becomes woven into decision-making processes, the imperatives of explainability, adaptability,

and bias mitigation emerge as non-negotiable precepts. Regrettably, the Recommendation, despite its ostensible acknowledgment of these exigencies, falters in providing explicit directives for their actualization in practical scenarios.

Enculturation, the contribution of AI to cultural heritage, unfurls apprehensions about its potential to accentuate existing biases in workplaces. AI-driven HR tools, purporting to adapt work culture policies based on employee interactions, unfurl the prospect of unwittingly entrenching discriminatory practices. The Recommendation, while paying homage to the altar of diversity, paradoxically abstains from prescribing effective countermeasures against the prospect of AI exacerbating workplace inequities.

Lastly, the fungibility of AI, its adaptability based on manifested needs, manifests challenges in ensuring compliance with regulatory frameworks and ethical standards across diverse contexts. An AI system employed in both a rural clinic and a specialized hospital necessitates nuanced adaptations. The Recommendation, while espousing the need for context-awareness, uncharacteristically skirts the provision of granular guidance for tailoring AI applications to distinct regulatory regimes and ethical benchmarks.

### **A Legal Scrutiny of the Bletchley Declaration: Boundaries and Prospects**

The Bletchley Declaration, an epochal accord forged in 2023, manifests a commendable stride towards fostering international collaboration on the intricate terrain of AI safety. However, a meticulous juridical examination reveals the inherent constraints that temper the efficacy of the Declaration in grappling with the multifaceted challenges entwined within the realm of AI.

### *Focus on Highly Capable General-Purpose AI*

The Bletchley Declaration's laudable emphasis on highly capable general-purpose AI models, while addressing potent risks, inadvertently confines its purview to a subset of the expansive AI landscape. The myopic focus excludes the nuanced threats posed by narrow AI applications, which, despite their specificity, wield the potential for substantial harm. The legal lacuna lies in the Declaration's failure to encompass the entire spectrum of AI risks, thereby limiting its prescriptive reach.

### *Categorization of Risks*

The Declaration's advocacy for countries to categorize risks based on national context and legal frameworks flirts with legal precariousness. This decentralized approach may inadvertently pave the way for divergent risk assessments, creating jurisprudential loopholes through which AI systems with profound risks could slip undetected. A harmonized, international standard for risk assessment is imperative to fortify the legal robustness of the Declaration.

### *Prioritizing Safety*

The resonant call within the Declaration to prioritize safety across the AI development continuum merits acclaim. However, its efficacy is constrained by the absence of concrete guidelines delineating the operationalization of this cardinal principle. Developers, bereft of explicit directives, may grapple with translating safety considerations into actionable components of their work, accentuating a deficiency in the legal operationalization of the Declaration's safety-centric ethos.

## *Special Responsibility for Developers*

The Declaration's recognition of developers' special responsibility for ensuring safety aligns harmoniously with established legal principles. Yet, the Declaration falters in furnishing explicit mechanisms to enforce this responsibility. Absent stringent accountability measures, developers may lack the requisite impetus to accord paramount importance to safety, thereby detracting from the legal efficacy of this assertion.

## *Transparency*

The Declaration's exhortation for transparency from private entities in the realm of advanced AI technologies stands as a legal imperative. Nevertheless, its Achilles' heel lies in the absence of crystalline standards delineating what constitutes sufficient transparency. This lack of precision exposes the legal framework to potential inconsistencies and inefficacies, diminishing its efficacy in mitigating AI-related risks.

While the key agenda points enshrined in the Declaration are conceptually sound, their potential is tempered by the absence of a lucid roadmap for implementation. Without a concrete and actionable plan, the objectives articulated in the Declaration risk remaining aspirational rather than evolving into legally enforceable directives.

In navigating the legal intricacies and constraints inherent in the Bletchley Declaration, the following recommendations emerge as beacons for fortifying its efficacy:

- *Expand Scope*: Propagate the expansion of the Declaration's scope to encompass the entirety of AI

risks, thereby obviating the legal lacuna associated with its current focus.

- *Harmonize Risk Assessment:* Institute concerted efforts to harmonize risk assessment frameworks across disparate jurisdictions, fostering legal consistency and minimizing vulnerabilities.
- *Operationalize Safety:* Concretize the Declaration's commitment to safety by providing explicit guidance on the integration of safety considerations throughout the AI development lifecycle.
- *Enforce Developer Responsibility:* Establish mechanisms to tangibly enforce the special responsibility of developers, ensuring their unwavering commitment to the safety of AI technologies.
- *Establish Transparency Standards:* Develop unequivocal standards for transparency, providing a legal yardstick for private entities to adhere to in their disclosures regarding AI systems.
- *Develop Implementation Plan:* Craft a comprehensive and actionable implementation plan to delineate the procedural roadmap for realizing the Declaration's key agenda points within a legally coherent framework.

In the crucible of these recommendations lies the potential to bolster the Bletchley Declaration's legal efficacy, rendering it not merely a symbolic step towards AI safety but a legally formidable instrument capable of navigating the intricate contours of the AI landscape.

## **Constraints of The Hiroshima AI Process Comprehensive Policy Framework (G7)**

The Hiroshima AI Process Comprehensive Policy Framework (G7)<sup>6</sup> emerges as a commendable endeavor by the G7, seeking to grapple with the intricate challenges posed by the burgeoning realm of AI. This legal analysis aims to critically scrutinize the framework, delineating its strengths while meticulously unveiling the intrinsic limitations arising from the characteristics of AI, elucidated in the provided text, and the scope constraints inherent in the framework itself<sup>7</sup>.

### *Alignment with AI Characteristics*

The Framework's commendable emphasis on risk management, resonating with concerns over AI's omnipresence and omnipotence, confronts limitations stemming from the dynamic nature of AI risks. Mandatory risk management frameworks, while robust, may falter in addressing emerging risks beyond their predefined scope. The evolving sophistication and ubiquity of AI necessitate a flexible, adaptive framework capable of encompassing novel risks.

Moreover, the Framework's focus on traceability and documentation, pivotal for accountability, encounters challenges in the face of AI's anthropomorphization. As AI systems emulate human interactions, the attribution of responsibility for decisions and actions becomes intricate. The Framework may need to evolve to accommodate the blurred lines between human and machine agency, considering nuanced accountability paradigms.

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<sup>6</sup> "G7 Leaders' Statement on the Hiroshima AI Process," The White House, 30 October 2023. <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/g7-leaders-statement-on-the-hiroshima-ai-process/>.

<sup>7</sup> Kantaro Komiya and Supantha Mukherjee, "G7 calls for developing global technical standards for AI," Reuters, 20 May 2023. <https://www.reuters.com/technology/g7-calls-developing-global-technical-standards-ai-2023-05-20/>.

### *Addressing Anthropomorphization and Naturalization*

The Framework's emphasis on post-deployment monitoring and third-party vulnerability reporting offers commendable reactive measures against AI's naturalization. However, a more proactive approach, integrating robust testing and validation methodologies, becomes imperative. Proactive measures serve as a bulwark against the emergence of naturalized AI systems, preemptively mitigating potential risks and reinforcing the framework's efficacy.

### *Tackling Enculturation and Fungibility*

While the Framework prioritizes responsible information sharing and shared standards to navigate AI's enculturation, explicit consideration of cultural norms and values remains somewhat elusive. Cultural influences profoundly shape AI systems, necessitating a more overt integration of cultural factors into the framework. Addressing these subtleties ensures that the framework comprehensively navigates the enculturation challenges inherent in AI.

The focus on AI-generated content identification and content provenance, though laudable, falls short of fully addressing the ethical dimensions of AI's fungibility. Technical measures alone may prove insufficient to mitigate concerns surrounding biased content and manipulative behaviors. A more nuanced approach, potentially integrating ethical guidelines, may fortify the framework against the ethical pitfalls associated with fungible AI.

### *Limitations in Framework Scope*

The framework's emphasis on advanced AI systems inadvertently restricts its applicability to a broader

spectrum of AI applications. As AI permeates everyday devices and services, the framework may need to broaden its scope to encompass the risks posed by less advanced AI systems. This expansion ensures a holistic approach to AI risk management, considering its pervasive integration into diverse facets of contemporary life.

The voluntary nature of the framework's measures raises concerns regarding widespread compliance. The absence of mandatory measures or incentivization mechanisms may impede the framework's adoption. Governments may need to deliberate on the integration of compulsory elements or tangible incentives to fortify the framework's effectiveness in encouraging widespread compliance<sup>8</sup>.

### *Enforcing Compliance*

A glaring limitation lies in the framework's lack of specific enforcement mechanisms. Clear and enforceable provisions are indispensable to ensure adherence to the framework's principles and recommendations. An absence of punitive measures may undermine the framework's efficacy, leaving it susceptible to non-compliance and diminishing its overall impact.

The Hiroshima AI Process Comprehensive Policy Framework (G7), while commendable in its endeavor, grapples with inherent limitations rooted in the very essence of AI and the contours of its own scope. A judicious recalibration, addressing these limitations and fortifying enforcement mechanisms, is imperative for the framework to transcend symbolic aspirations and materialize into a robust legal instrument, capably navigating the

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<sup>8</sup> Derrick Cogburn, "Four Questions on AI Global Governance Following the G7 Hiroshima Summit," School of International Service, American University, Washington, DC. <https://www.american.edu/sis/news/20230523-four-questions-on-ai-global-governance-following-the-g7-hiroshima-summit.cfm>.

multifaceted challenges posed by the evolving landscape of AI.

## **The Juridical Frontiers of the Artificial Intelligence Act**

The Artificial Intelligence Act (“AIA”) heralds a pivotal stride in formulating a cohesive regulatory framework for AI within the European Union. This legal analysis meticulously dissects the strengths and inherent constraints of the AIA, spotlighting its commendable risk-based approach while meticulously unveiling limitations that may impede its efficacy in navigating the dynamic landscape of AI risks.

### *Aligning with AI Characteristics*

The AIA's commendable risk-based approach aligns with the overarching concerns regarding AI's omnipresence and omnipotence. However, its exclusive focus on high-risk AI systems may inadvertently sidestep the pervasive nature of AI across diverse sectors. The Act's reliance on ex-ante risk assessments, while valuable, may falter in encapsulating the fluidity of AI risks as these systems evolve, potentially leaving regulatory blind spots.

Moreover, the AIA's provisions for data governance and human oversight admirably tackle AI's anthropomorphization and naturalization. Yet, this emphasis primarily within high-risk domains may fall short in addressing the subtle biases and behavioral manipulations that may emanate from low-risk applications. Technical measures, while crucial, may inadequately grapple with the broader ethical considerations intertwined with AI-generated content and its potential influence on human decision-making.

## *Navigating Anthropomorphization and Naturalization*

The AIA's focus on high-risk AI systems admirably navigates challenges posed by AI's anthropomorphization and naturalization. However, the Act's scope limitation to high-risk applications may not fully encompass the ethical dimensions emanating from low-risk scenarios. The Act may need to broaden its purview to ensure a comprehensive approach to anthropomorphization and naturalization across the entire spectrum of AI applications.

## *Grappling with Fungibility*

Addressing AI's fungibility, the AIA robustly tackles AI-generated content identification and content provenance. Nonetheless, the Act's reliance on technical measures may not comprehensively address the ethical concerns surrounding AI-generated content. The potential for deepfakes and information manipulation warrants a nuanced approach that transcends technical considerations, delving into the broader ethical implications.

## *Scope and Global Implications*

The AIA's geographical focus within the EU may inadvertently confine its relevance in a globally interconnected AI landscape. Given the transnational nature of AI development and deployment, the Act may need to contemplate harmonization with international standards and foster collaboration with non-EU countries. Ignoring this global dimension may hinder the AIA's effectiveness in steering AI regulation on a truly international scale.

## *Regulatory Reach and Enforcement Mechanisms*

The reliance on voluntary measures and self-reporting within the AIA raises concerns about widespread compliance. Governments might need to explore the integration of mandatory measures or compelling incentives to ensure organizations adopt the Act's principles. The AIA's dearth of specific enforcement mechanisms presents a potential stumbling block. Clear, enforceable provisions are imperative to guarantee adherence, necessitating penalties for non-compliance and robust mechanisms for redress for affected individuals.

### **Conclusion**

The emergence of AI has revolutionized various aspects of our lives, from healthcare to transportation to communication. However, the rapid advancement of AI technologies has also raised significant concerns about their potential risks, including ethical violations, biases, and misuse. In response to these concerns, governments and international organizations have begun developing regulatory frameworks to govern the development and deployment of AI.

The UNESCO Recommendation on AI, the Bletchley Declaration, the Hiroshima AI Process Comprehensive Policy Framework (G7), and the European Union's AIA represent significant steps towards establishing global standards for responsible AI development and deployment. These frameworks outline a range of principles and recommendations, emphasizing the need for transparency, accountability, risk management, and ethical considerations.

Despite their strengths, these regulatory frameworks face certain limitations in effectively addressing the evolving and complex nature of AI risks. These limitations

stem from the inherent characteristics of AI, such as its omnipresence, omnipotence, anthropomorphization, naturalization, enculturation, and fungibility. Additionally, the scope and enforcement mechanisms of these frameworks may not be sufficient to ensure widespread compliance and address non-compliance.

To effectively address the challenges posed by AI, future regulatory frameworks should consider the following:

- *Expanding their scope to encompass a broader range of AI applications:* As AI becomes more pervasive and integrated into everyday devices and services, regulatory frameworks should not be limited to high-risk AI systems.
- *Adopting mandatory measures and enforceable mechanisms:* Voluntary measures and self-reporting may not be sufficient to ensure widespread compliance and adoption. Clear and enforceable mechanisms, including penalties for non-compliance, are necessary to promote responsible AI development and deployment.
- *Addressing the ethical concerns surrounding AI-generated content and the potential for AI to manipulate human behavior:* Ethical considerations should be central to the development of regulatory frameworks. Frameworks should address the potential for AI to perpetuate biases, undermine trust in information sources, and manipulate user behavior.
- *Promoting international harmonization and cooperation:* As AI becomes increasingly interconnected and global in scope, international harmonization and cooperation are essential to ensure consistent and effective AI governance.

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## **Enhancing Corporate Governance in India with Mandatory Integrated Reporting: Adding 'Value' to Indian Reporting Framework**

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### **Abstract**

Corporate Governance hinges on two vital principles: Disclosure and Transparency. Reporting serves as their linchpin. With evolving business landscape around the world, reporting standards have adapted over time. This article explores how non-financial information has gained parity with financial data in reporting. Integrated Reporting is examined as a way to meet modern business regulations. We delve into its concept and international framework, then study existing regulations. It's thereby discussed how current economic and business environment demands Integrated Reporting as a reporting method. Thus, emphasizing upon the fact that how Integrated Reporting can tackle issues in India's reporting framework. Analysing its adoption locally, we conclude that while Indian reporting matches global norms, it lacks impact due to structural flaws. And these structural flaws result in reporting framework being reduced to compliance obligation and an increasing burden on Companies in India. Recommendations include a comprehensive reporting framework, making Integrated Reporting mandatory, and increased role of SEBI's in advancing Corporate Governance through education and training efforts.

### **Keywords:**

Corporate governance, integrated reporting, finance, SEBI

## Introduction

*"A good financial analysis will tell you what happened. A good sustainability report will tell you what will happen."*

- Paul Polman

In an era characterized by liberalization and globalization steered by multinational corporations (“MNCs”), the significance of Corporate Governance comes to the forefront, delineating the manner in which a company should be 'directed and controlled.'<sup>1</sup> At its core lie six fundamental tenets: ensuring basis for CG framework, Disclosure and transparency, rights and equitable treatment, responsibilities of Board, stakeholders and other intermediaries<sup>2</sup>. In this landscape, reporting assumes a pivotal role. The litmus test of a firm's adherence to the principles of corporate governance rests upon transparency, wherein reporting emerges as the foundational instrument. Paul Polman aptly encapsulated this notion by asserting that a robust report should not merely recount past occurrences but should also offer a glimpse into the future.

Traditionally, reporting has been intertwined with financial statements and audits. However, the global landscape has undergone a seismic transformation. Presently, over 90% of S&P 500 companies draw their value from intangible assets<sup>3</sup>, rendering financial reporting somewhat ritualistic and rendering conventional accounting standards obsolete. This omission stems from

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<sup>1</sup> Sir Adrian Cadbury, *The Financial Aspects of Corporate Governance*, 14, (1<sup>st</sup> ed. 1992).

<sup>2</sup> OECD (2015), *G20/OECD Principles of Corporate Governance*, OECD Publishing, Paris.

<http://dx.doi.org/10.1787/9789264236882-en>

<sup>3</sup>Martin Jarzebowski, *As Intangible Assets Grow, So Does The Role Of ESG Standards*, (Dec 29, 2020,09:20am), <https://www.forbes.com/sites/forbesfinancecouncil/2021/12/29/as-intangible-assets-grow-so-does-the-role-of-esg-standards/?sh=7f9dadfe4d44>

their inability to encompass the full spectrum of a company's intangible assets.

Numerous endeavours have been undertaken to elevate reporting standards in tandem with evolving business dynamics. Sequentially, financial reporting in India has made way for Sustainability Reports, followed by Business Responsibility Reports. While the financial reporting centres on a company's financial data, both the latter reports encompass non-financial data. Integrated Reporting, the latest iteration, represents a forward leap encompassing unification of both financial and non-financial data. Over the last decade, the acceptance of integrated reporting has steadily grown, both in India and across the globe. While the role of Integrated Reporting in fortifying corporate governance is indisputable, its execution grapples with multifarious challenges. The task of persuading firms to adopt integrated reporting is arduous, necessitating concurrent proactive measures from governmental bodies to facilitate its adoption.

This article delves into the imperative need for the mandatory adoption of integrated reporting in India, whilst scrutinizing the hurdles obstructing its implementation. The discourse extends to the potential holistic impact SEBI can bring by amending the existing regulations.

## **Integrated Reporting**

Integrated Reporting, according to the International IR framework is a, “concise communication about how an organization’s strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value over the short, medium and long term.”<sup>4</sup> In simpler terms, this definition elucidates that an

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<sup>4</sup> IIRC (2013), The International IR Framework, IIRC Publishing, Delaware <https://www.integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>

integrated report is a concise document designed to acquaint investors and the general public that how company's multifaceted endeavours across various sectors are directed towards 'value creation' over time. Such a report amalgamates both financial and non-financial data, underscoring the organization's adept deployment of capital. By taking into account company's short, medium, and long-term strategies by delving into its past present and future, integrated reporting caters efficiently to investors, general public and other stakeholders.

### *Integrated Reporting vis-à-vis "value creation"*

The term 'value creation' has no universally uniform definition. It pertains to the augmentation of an organization's resources and capital—both financial and non-financial—by means of innovation, while gauging the outcomes through social and environmental metrics. Presently, an amplified emphasis is placed on aligning a company's undertakings with 'value creation,' a facet that should prominently feature in a company's annual reports. The Special Committee on Financial Reporting, established by the American Institute of Certified Public Accountants in 1991, underscored the necessity for communications directed at investors and creditors to “focus more on the factors that create a long-term value”.

However, the ambit of 'value creation' is not limited to economic activities and extends to a company's symbiotic interactions and relationships with social and environmental factors. While financial value retains its relevance, it is by itself inadequate. The evaluation of 'value creation' encompasses various dimensions: the types of available capital and assets, the business model, pivotal products, and even by-products that either create value or erodes it. It also considers outcomes borne from intricate nonlinear interplays of diverse factors.

Integrated reporting functions as an apparatus that aggregates, monitors, and evaluates such multifaceted data. It culminates in a comprehensive report that outlines how a business model synergizes different forms of capital and converts economic transactions into social interactions, thereby engendering short, medium, and long-term value for stakeholders, society, and the environment. By strategically managing a company's activities with future sustainability in perspective, integrated reporting guides operations. This is exemplified by reports from diverse corporations. Anglo American plc's Social Development Report elucidates value creation in terms of enhancements in infrastructure and local expenditure<sup>5</sup>. The Tata Steel Group's annual report highlights value creation through their manufacturing-linked processes<sup>6</sup>. Similarly, the annual report of the Go-Ahead Group underscores how their business model actively contributes to value creation<sup>7</sup>.

### *Integrated Reporting Framework*

The inception of integrated reporting was catalysed by the Prince of Wales in collaboration with prominent UN entities such as the International Federation of Accountants (“*IFAC*”) and the Global Reporting Initiative (“*GRI*”). This initiative led to the establishment of the International Integrated Reporting Committee, subsequently renamed as the International Integrated Reporting Council. In November 2011, the council formulated the Integrated Reporting Framework.

The Integrated Reporting Framework considers both their internal and external environment in which an organization operates. In this context, the core components of purpose, mission, and vision assume pivotal roles,

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<sup>5</sup> Anglo American plc Social Development Report, 31 December 2012, p.24-35, [www.angloamerican.com](http://www.angloamerican.com)

<sup>6</sup> Tata Steel Group Annual Report for the year 2011-2012 p.62, [www.tatasteel.com](http://www.tatasteel.com)

<sup>7</sup> Go-Ahead Group plc Annual Report, 30 June 2012, p.6-7, [www.go-ahead.com](http://www.go-ahead.com)

delineating the organization's intentions in a concise and comprehensible manner at the same time. Continual monitoring and analysis of these core components aid in identifying risks and opportunities that align with organizational objectives. This, in turn, culminates in the creation and dissemination of a comprehensive perspective on the organization's undertakings in terms of “value creation”.

Integral to the IIRC's framework are seven guiding principles, each serving as a bedrock for the integrated report's composition:

1. “Strategic Focus and Future Orientation
2. Connectivity of Information
3. Stakeholder Relationships
4. Materiality
5. Conciseness
6. Reliability and Completeness
7. Consistency and Comparability”

Beyond these foundational principles, integrated reporting encompasses eight content elements:

1. “Organizational Overview and External Environment
2. Governance
3. Business Model
4. Risks and Opportunities
5. Strategy and Resource Allocation
6. Outlook
7. Performance
8. Basis of Presentation”<sup>8</sup>

In addition to the conventional focus on Financial Capital, the Integrated Reporting framework incorporates five other forms of capital: Manufactured, Intellectual,

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<sup>8</sup>IFRS (2021), Integrated Reporting, The International IR Reporting Framework, [www.integratedreporting.org/wp-content/uploads/2021/01/InternationalIntegratedReportingFramework.pdf](http://www.integratedreporting.org/wp-content/uploads/2021/01/InternationalIntegratedReportingFramework.pdf)

Human, Social and Relationship, and Natural Capital. This inclusion is not obligatory but rather functions as a guiding principle, fostering the incorporation of diverse capital forms into the reporting framework. This forms the legal framework around integrated reporting.

## **Global Acceptance**

Following the adoption of this framework, a number of stock exchanges have incorporated it within their corporate governance legal structures. Among the pioneers was South Africa, which, through Chapter 9 of its King III principles on integrated reporting and disclosure, instituted mandatory IR implementation in the Johannesburg Stock Exchange<sup>9</sup>. This landmark move positioned South Africa as a trailblazer in integrated reporting within the Middle East and Africa.

In 2010, France embraced integrated reporting, integrating it into Article 225 of Grenelle II<sup>10</sup>. The regulatory directive mandated large listed enterprises to align with these norms by 2012, while smaller companies followed suit by 2014. Simultaneously, Japan introduced its Corporate Governance Code<sup>11</sup>, effective from June 1, 2015, ushering in an era where around 180 Japanese firms were poised to adopt integrated reporting. Japan's Code significantly catalysed integrated reporting adoption, particularly in the Asia Pacific realm.

Presently, over 2500 prominent organizations across 70 markets have adopted Integrated Reporting as part of their Corporate Governance practise, a testament to the growing momentum. However, despite these encouraging

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<sup>9</sup> Jill Solomon and Warren Maroun, Integrated reporting: the influence of King III on social, ethical and environmental reporting, The Association of Chartered Certified Accountants, London, (2012)  
<https://www.accaglobal.com/content/dam/acca/global/PDF-technical/integrated-reporting/tech-tp-iirsa.pdf>

<sup>10</sup> Grenelle II Act, A. 225, 2010 (France).

<sup>11</sup> Japan's Corporate Governance Code, §3, 2021, (Japan).

statistics, the path forward is riddled with challenges. Notably, while corporations globally have begun to adopt integrated reporting, many top-ranking global corporations are yet to fully accept it. Reports underscore that merely 14 out of the S&P 500 firms have integrated reporting, juxtaposed against 78% of firms that have embraced sustainability reporting standards<sup>12</sup>.

While the progress achieved is inspiring, the journey's complexities persist, exemplifying the nuanced landscape in which corporations navigate the implementation of integrated reporting.

## **Indian Standards vis-à-vis Integrated Reporting in India**

### *Indian Reporting Standards and Challenges*

In India, Reporting standards are delineated by the Companies Act of 2013, accompanied by its respective regulations and the directives set forth by the Securities and Exchange Board of India (SEBI). The landscape of reporting encompasses a range of reports, both mandated by the Companies Act and stipulated by SEBI. These include financial reports, Board's reports<sup>13</sup>, Directors' Responsibility Statements, and Corporate Social Responsibility ("CSR") reports<sup>14</sup> in accordance with the statute.

Alongside, SEBI prescribes additional reporting obligations for listed entities, has regularly come up with updated guidelines and measures like Grievance Redressal Reports and Business Responsibility and Sustainability Reporting and Corporate Social Responsibility Voluntary

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<sup>12</sup> ESGRI, ESG Reporting and ESG Corporate Integration, there is a difference, ESG Reporting Intelligence, (May 20, 2022), <https://esgri.com/esg-reporting-and-esg-corporate-integration-there-is-a-difference/>

<sup>13</sup> Companies Act, 2013, § 134, No. 18, Acts of Parliament, 2013, (India)

<sup>14</sup> Companies Act, 2013, § 135, No. 18, Acts of Parliament, 2013, (India)

Guidelines (2009) etc. In alignment with the Sustainability Reporting Framework, the Ministry of Corporate Affairs introduced Business Responsibility and Sustainability Report vide its circular in May, 2021, forming it a facet of the Annual Report. Subsequently, SEBI mandated these reports for the top 1000 listed entities under Regulation 34(2)(f) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. This evolution emphasized SEBI's holistic focus on Environmental, Social, and Governance considerations.

However, amidst these stringent and comprehensive standards, Indian reporting approaches confront inherent challenges. While the requirements scattered across diverse laws, regulations, guidelines, and circulars, a notable absence of an integrated corporate governance perspective prevails. These fragmented reporting obligations curtail the holistic portrayal of corporate governance, resulting in a too many fragmented reports and disclosures under various separate regulations.

The repercussions are multi-fold: redundant efforts invested by companies in producing separate reports for varying regulatory bodies like ROC, Stock Exchanges, and SEBI, with overlapping data. It also leads to consequent escalation in operational costs and burdens engenders inefficiency while constricting India's business environment's ease. Additionally, global investors' ability to comprehend Indian businesses gets a setback, resulting in expected investments going unrealized. Meanwhile, existing investors' expectations have also pivoted towards Environmental, Social, and Governance factors but remain unsatisfied in Indian reporting environment.

In light of these complexities, it becomes apparent that although India maintains high reporting standards, its potential remains underutilized, rendering it bereft of

the competitive advantage even after promptly adopting global reporting standards.

### *Greenwashing due to Absence of Clear Guidance*

The absence of a unified implementation approach to existing regulations has inadvertently given rise to a practice known as 'greenwashing.' This entails firms selectively reporting disclosures that present an incomplete picture of their operations, aimed at circumventing penalties. Firms tend to spotlight positive aspects in separate reports to obscure material negative factors, thereby meeting regulatory requirements while sidestepping the regulations' underlying intent. This underscores the pressing need for annual reports to comprehensively showcase a firm's practices, compelling management—rather than just compliance officers—to adopt regulatory norms.

### *Dynamic Economic Environment concerning Integrated Reporting*

In February 2017, SEBI released voluntary guidelines endorsing the adoption of integrated reporting in India through a circular. Subsequently, the onset of the COVID-19 pandemic at the end of 2019 profoundly impacted the global economy. This upheaval prompted the realization that non-financial capital, encompassing environmental and social governance risks and opportunities, complements a company's financial capital. Consequently, there emerged an imperative to recalibrate reporting practices, ensuring investors and stakeholders gain a panoramic perspective of an organization's prospects. Integrated reporting, underpinned by a multi-capital approach, emerges as a pivotal tool for evaluating company performance. Regulatory bodies, investors, and global citizens advocated for mandatory integrated reporting as a stride towards bolstering corporate governance. Amid

global uncertainties including events like the Russia-Ukraine conflict, supply chain disruptions, and food shortages, established companies were compelled to take on a more responsible role in driving global economic growth.

In this backdrop, the rapidly growing Indian business ecosystem seized global attention as the swiftest expanding market. The role Indian companies played resonated profoundly. The private sector, particularly, exhibited unwavering support by contributing substantially to the PM-CARES fund, raising around Rs. 11,000 crores<sup>15</sup>. Amid lockdowns, Competitive companies came together to adeptly managed supply chains<sup>16</sup>. However, the plight of migrant labourers also exposed the callous capitalistic facets of Indian firms<sup>17</sup>. Simultaneously, Indian brands' noteworthy contributions in “value creation” did not escape global recognition<sup>18</sup>. It's noteworthy that those firms that advanced with purpose and vision fared better than peers in a similar market<sup>19</sup>. The post-pandemic phase witnessed a shift towards domestic manufacturers, with firms involved in local production enjoying customer favour and government incentives. These developments propelled Indian companies to articulate their journey of 'value creation'

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<sup>15</sup> HT, PM-CARES Fund collected nearly ₹11,000 crore in first year, (Feb 08, 2022, 12:35 AM), <https://www.hindustantimes.com/india-news/pmcares-fund-collected-nearly-rs-11-000-crore-in-first-year-101644260701898.html#:~:text=The%20PM%2DCARES%20Fund%2C%20created,on%20its%20website%20on%20Monday>.

<sup>16</sup> Shubhomoy Sikdar, Competitors join hands to tide over supply-chain challenges amid lockdown, The Business Standard (April 6, 2020, 10:49 AM) [www.business-standard.com/article/companies/the-power-of-collaboration-120040501278\\_1.html](http://www.business-standard.com/article/companies/the-power-of-collaboration-120040501278_1.html)

<sup>17</sup> <https://theprint.in/opinion/indias-heartless-capitalists-deserve-the-labour-shortages-they-are-about-to-be-hit-with/418845/>

<sup>18</sup> TOI, Indian start-ups continued to create value, wealth even during pandemic: PM Modi, The Times of India, (May 29, 2022, 11:49 AM) <https://timesofindia.indiatimes.com/business/india-business/indian-start-ups-continued-to-create-value-wealth-even-during-pandemic-pm-modi/articleshow/91866322.cms>

<sup>19</sup> George Serafeim, Public Sentiment and the price of Corporate Sustainability, Harvard Law School Forum on Corporate Governance, (Oct 30, 2018) <https://corpgov.law.harvard.edu/2018/10/30/public-sentiment-and-the-price-of-corporate-sustainability/>

over time. Their orientation shifted from pure profit-making to long-term value creation, cultivating sustainable business models.

Slowly, various events led the Indian enterprises to understand the importance of integrated reporting as they grappled with negative fallout despite contributing to society and the environment. The notable instance of Adani, a frontrunner in green energy transformation in India, facing protests over overseas mine acquisitions, underscored this phenomenon. Similarly, the Indian stock market experienced a downturn due to the Hindenburg report on Adani Enterprises—data that was already publicly available<sup>20</sup>. Even the Indian diamond industry, transitioning towards laboratory-grown diamonds, encountered repercussions over alleged Russian links in the American market<sup>21</sup>. These challenges persistently confront Indian companies as they expand globally. Hence, Indian corporations have recognized the significance of integrated reporting to effectively communicate their contributions and attract a global customer and investor base. This realization has spurred a growing trend toward more comprehensive reporting and heightened sustainability disclosures, further validating integrated reporting as an efficacious means to meet these evolving demands.

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<sup>20</sup> Swaraj Singh Dhanjal, Selective misinformation, concealed facts, ulterior motive, The Mint, (Jan 29, 2023, 11:59 PM) <https://www.livemint.com/companies/news/selective-misinformation-concealed-facts-ulterior-motive-adani-hits-back-11675016738079.html>

<sup>21</sup> Sugata Ghosh & Sutanuka Ghosal, US freezes \$26-m fund transfers by Indian diamantaires, The Economics Times, (Aug 11, 2023, 6:37 PM) <https://m.economictimes.com/industry/cons-products/fashion-/-cosmetics-/-jewellery/us-freezes-26-m-fund-transfers-by-indian-diamantaires/articleshow/102483620.cms>

## *Voluntary Implementation of Integrated Reporting in India Based on IIRC Framework*

Integrated reporting, a progressive evolution beyond conventional reports, found its way to India slightly later. In February 2017, SEBI issued a circular, recommending that the top 500 listed entities in India embrace integrated reporting on a voluntary basis. Notably, SEBI did not furnish explicit guidelines regarding the procedural intricacies. The circular stipulated adherence to the seven principles and the disclosure of six categories of capital, laid down in IIRC framework<sup>22</sup>. As per Regulation 4(1)(d) of SEBI's Listing Obligations and Disclosure Requirements, listed entities are mandated to “provide adequate and timely information to recognized stock exchange(s) and investors”. Therefore, companies are now obligated to furnish an array of reports within the ambit of India's corporate disclosure framework.

### *The Current Lacunae in Existing Guidelines and Their Insufficiency*

Presently, SEBI's instructions concerning integrated reporting remain voluntary in nature. Since 2017, companies are not bound to adhere to these reporting standards as an obligatory mandate. Over the past six years, several prominent companies, including those within the Tata Group, Reliance Industries, and Adani Enterprises, have voluntarily embarked on the path of integrated reporting. This juncture signifies the opportune moment for SEBI to contemplate mandatory integrated reporting for larger enterprises and voluntary adoption for a broader spectrum of firms.

However, instituting mandatory implementation is a complex endeavour. Numerous companies still lack a comprehensive understanding of such reporting

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<sup>22</sup> Ibid.

mechanisms. SEBI would play a pivotal role in nurturing awareness by imparting training to professionals and furnishing detailed guidelines. Educating professionals would lay the foundation of awareness, while comprehensive guidelines would establish the benchmark. This call for assistance from SEBI stems from the nature of integrated reporting, which necessitates a synthesis of both financial and non-financial data—unlike the automation-friendly financial data collection. Collating diverse and divergent non-financial data defies automation. Consequently, the guidelines should encompass essential performance indicators similar to those in Business Responsibility and Sustainability Report which would resonate with India's social and environmental concerns. These metrics would not only standardize reporting but also enable benchmarking and facilitate the identification of gaps, streamlining the journey towards fortified corporate governance.

### **Integrated Reporting: A Critical Analysis**

In the backdrop of above discussion, we understood integrated reporting as a report based mainly upon the non-financial indicators. It is not the case as financial reporting has the same crucial role to play in Integrated Reporting as non-financial data plays. Similarly, Integrated reporting is such a comprehensive report that it would not just be a compliance function limited to compliance officers. Considering the complex and non-uniform data required, the organization as a whole would be involved in such reporting with lot of changes required in style of working of the management.

#### *Financial Aspects within Integrated Reporting*

While Integrated Reporting predominantly appears geared towards non-financial reporting, its financial aspects, in tandem with its contribution to integrated thinking, are

immensely significant. The financial dimensions, coupled with its role in fostering integrated thinking, hold substantial importance. Over an extensive period, the financial aspects have upheld the responsibility of safeguarding the 'business perspective' within organizations, given their pivotal involvement in financial reporting, funding, treasury operations, and strategic planning. As the financial sector progressively embraces and adapts its functions to enhance integrated reporting, its proactive endeavours in facilitating integrated planning and management convey a potent message across the entire organization. Notably, financial functions serve as a linchpin in integrated thinking, ensuring synergy among people, processes, and systems. Indeed, the evaluation of 'value creation' would remain incomplete without financial data, which has critical in assessment of its short-term, medium-term, and long-term impact in a business activity.

### *Methodical Implementation and the Crucial Board Role*

Formulating an integrated report is a multifaceted endeavour, necessitating comprehensive contemplation of the business model, strategy, governance, performance, and future trajectory. This process entails harmonizing existing developments towards a 'future state' and cultivating a 'connected strategy.' Such intricacies demand collation of material information from diverse departments, all while guarding against the inadvertent disclosure of sensitive information that could compromise competitive advantage. Undertaking this intricate task hinges on the Board's commitment. Given that it involves multiple cross-functional departments and their respective inputs, the indispensable authorization and backing from the Board are prerequisites. Hence, the Board assumes a pivotal role in delineating the organization's strategic trajectory, simultaneously fostering a culture towards adoption of integrated reporting.

## **Integrated Reporting in Indian Reporting Framework: Critical Analysis & Way Forward**

Although Indian reporting standards are set at a high bar, a range of structural and enforcement challenges persists within the framework. This discrepancy becomes evident when considering that while stringent reporting standards are followed as regulatory mandates, the intended essence behind these regulations often remains unexplored. Indian corporate governance experienced considerable enhancement through the Listing Obligations and Disclosure Requirements (“*LODR*”) Regulations, which brought about procedural adherence, yet often fell short in embodying true substance. This partial realization hindered the attainment of a comprehensive corporate governance landscape, leaving companies short of the impetus to wholeheartedly embrace these standards. Consequently, these regulations metamorphosed into mere compliance obligations, relegated to the domain of compliance officers rather than ingrained within the management ethos.

Parallely, the adoption of integrated reporting has been greeted with scepticism within the Indian context, rooted in diverse factors. Indian enterprises have not yet solidified their global competitive positioning. Committing resources and efforts to integrated reporting engenders initial costs in terms of monitoring, reviewing, and reporting, without any immediate and direct benefit. Moreover, Indian businesses find themselves entangled in a web of obligatory hard law measures, mandating the submission of numerous fragmented and distinct reports to multiple regulatory authorities under corporate laws. The lack of definitive guidelines and standards concerning integrated reporting in India further compounds the hesitance. There's also an apprehension among companies that divulging non-financial disclosures might erode their competitive edge. This amalgamation of factors leads to a

dilution of direction, rendering Indian reporting standards more of a perfunctory compliance ritual rather than a fervent embodiment of corporate governance spirit amidst the lack of expected guidance and support required from SEBI. Such guiding and supportive measures are discussed below.

For unleashing the potential of Indian Reporting Standards, SEBI can adopt various measures as suggested below:

- A well-structured and comprehensive reporting code, which must be the sole guiding principle of reporting in India
- Adoption of compulsory Integrated Reporting in India for a greater number of firms and voluntary adoption of such reports for smaller firms.
- A detailed guideline along with Key Performance Indicators (“*KPIs*”) similar to Sustainability Reports to set a benchmark aligned with ESG Considerations.
- SEBI can conduct capacity building and awareness programmes to educate businessmen and conduct training programmes for professionals.

## **Conclusion**

Transparency, an indispensable facet of corporate governance, finds its cornerstone in reporting. The global business landscape has undergone a profound transformation, transcending the boundaries of mere economic endeavours. Today, stakeholders spanning from customers to investors and creditors exhibit a vested interest in the 'value creation' stemming from economic activities. This assurance of sustainable long-term viability has revolutionized the perception of reporting. The

emergence of integrated reporting wasn't a mere enhancement; rather, it emerged as a responsive practice, tailored to meet the demands of the contemporary business milieu. The global landscape has progressed significantly in this trajectory.

Indian reporting and disclosure standards have made strides to align with international benchmarks, particularly catalysed by regulations such as Listing Obligations and Disclosure Requirements. Yet, their potential remains partially untapped, owing to inherent structural and systemic flaws in the reporting framework. SEBI has played a pivotal role in elevating reporting standards, infusing 'form' into existing regulations. However, there remains a juncture where the 'substance' of these regulations requires reinforcement. This would ensure that reporting by Indian corporations transcends the realm of mere regulatory compliance, embodying the very essence of regulatory intent.

In conclusion, the paradigm shifts towards enhancing corporate governance through integrated reporting, aligned with Indian reporting standards, reflects a progressive stride. The journey thus far has been marked by regulatory alignment and the pursuit of meaningful reporting. However, the voyage to complete 'substance' integration demands concerted efforts to bridge existing gaps. This endeavour, in its entirety, presents an avenue to empower Indian firms to contribute to a business ecosystem characterized not only by regulatory adherence but by authentic value creation.

## **Child's Play No More: Regulating Child Influencers in India**

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### **Abstract**

This paper delves into the evolving landscape of child influencers in India, a domain currently lacking specific regulatory frameworks. It explores the changing dynamics brought about by digitization, enabling children to independently create and disseminate content on platforms like YouTube and Instagram. The absence of dedicated legislation in India for child influencers is highlighted, prompting the argument for the necessity of such regulation. Drawing insights from the child influencer law in France and draft guidelines from the National Commission for Protection of Child Rights (NCPCR) in India, the paper outlines critical aspects to consider in drafting an Indian law. Emphasizing that existing regulations for child actors cannot be mechanically applied to child influencers, the paper underscores the need for a nuanced and context-specific legal framework.

The discussion extends to regulatory challenges in protecting child influencers, stressing the importance of extensive research, stakeholder consultations, and adherence to international obligations. As the landscape evolves rapidly, the paper calls for a comprehensive approach that balances child protection principles with the unique challenges of the Indian context, urging the drafting process to be inclusive and informed by a variety of perspectives.

### **Keywords**

Influencers, regulation, NCPCR, virtual regulation, child rights

## Introduction

The International Labour Organization ('ILO') definition of child labour covers hazardous work which threatens the childhood, dignity, health, and compulsory education of the child. Children are still allowed to engage and monetise activities which allows them to become productive members of society.<sup>1</sup> This is supported by the exceptions provided in Articles 7 and 8 of the Minimum Age Convention, 1973 (No. 138) for light work and artistic performances (which includes participation in theatre, concerts, and advertisements).<sup>2</sup> The hours and conditions of work are still regulated by law.<sup>3</sup> Exception for artistic performance, particularly child acting is one that has been adopted by many countries, including India. It is seen as an activity which allows children to develop a skill and talent.<sup>4</sup> Traditional imagination of children's artistic performances was based on their participation in cinema and events on sets which were facilitated by production houses.

Internet and digitisation have weakened the hold of production houses as it has become much easier to create content. This is because the quality of electronic devices has improved and they are much more accessible. This has enabled ordinary people to produce high-quality content at low costs.<sup>5</sup> Even children can create and disseminate their

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<sup>1</sup> 'What is child labour?' (*ILO*) <<https://www.ilo.org/ipec/facts/lang--en/index.htm>> accessed 16 April 2023

<sup>2</sup> Convention No. 138 on the Minimum Age, 1973 (in Child-Friendly Language) (*ILO*, January 2015)

<sup>3</sup> ILO Convention No. 138, art. 7 and 8 <[https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100\\_ilo\\_code:C138](https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ilo_code:C138)> accessed 16 April 2023

<sup>4</sup> Katherine Sand, 'Child performers working in the entertainment industry around the world: An analysis of the problems faced' (2003) ILO WP. 186 2, 7 <[https://www.ilo.org/public/libdoc/ilo/2003/103B09\\_652\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/2003/103B09_652_engl.pdf)> 17 April 2023; Marina A. Masterson, 'When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"' (2021) 169 U. Pa. L. Rev. 577, 587 <[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9726&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9726&context=penn_law_review)> accessed 6 March 2023

<sup>5</sup> Julian Kücklich, 'Precarious Playbour: Modders and the Digital Games Industry' (2005) *The Fibreculture Journal* <<https://five.fibreculturejournal.org/fcj-025->

performances through platforms like YouTube, Instagram, and Facebook. This has given rise to ‘child influencers.’

While the definition of this term is contested, this paper uses the term child influencer to refer to children (persons under 18, unless specified otherwise) who engage in content creation (independent and sponsored) on various social media platforms.<sup>6</sup> Currently, there is no law in India which regulates child influencers. This paper seeks to study this gap.

It argues that there is a need for a law in India to regulate the activities of child influencers. It begins by first, showing that online activities of children can be considered labour. Second, it discusses the child influencer law in France and the National Commission for Protection of Child Rights (‘NCPDR’) draft guidelines in India which covers child influencers. Drawing on both, it highlights certain aspects which should be kept in mind while an India law is drafted. It shows that the Indian law regulating child actors cannot be mechanically applied to child influencers.

## **All Play, No Work?**

Before delving into the kind of law that needs to be brought in, we must see whether online activities of children are of a nature which merit regulation to begin with. This question is important to answer because parents of child influencers insist that their activities are not work but fun which is filmed.<sup>7</sup> This is also supported by the content

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precarious-playbour-moddors-and-the-digital-games-industry/> accessed 26 April 2023

<sup>6</sup> House of Commons, *Influencer culture: Lights, camera, inaction?* (HC 258, 2022) para 117

<<https://publications.parliament.uk/pa/cm5802/cmselect/cmcmds/258/report.html>> accessed 6 March 2023

<sup>7</sup> Julia Carrie Wong, “Kidfluencers’ are earning millions on social media, but who owns that money?” *The Guardian* (24 April 2019)

<<https://www.theguardian.com/media/2019/apr/24/its-not-play-if-youre-making->

where children are shown engaging in domestic tasks and being frivolous. Parents use “calibrated amateurism” to manufacture authenticity by making it seem like both children and parents are amateurs which may or may not be true.<sup>8</sup> There is also a constant attempt to downplay the celebrity status of children by focusing acutely on their days to show that they are only “normal kids.”<sup>9</sup> The next section shows that the activities of child influencers can be considered labour and merit regulation. It argues this in two ways. First, using the theory of ‘playbour’ and second, using the fact of monetization.

### **‘Playbour’**

Labour has been defined as productive work, particularly manual work for which wages are paid.<sup>10</sup> Here, the terms work and labour have been used synonymously. However, a fine distinction between the two can be drawn. As per Marx’s definition work is ‘free activity.’ Alienation from work is labour. It is alienating because the nature and arrangement of work are such that labourers exercise no control over either means or products produced.<sup>11</sup> Today, the internet has changed the tools of production. Many activities take place online ranging from content creation to the building of networks. All this browsing manufactures data about the desires and views of the user. These activities have been described as play labour (‘playbour’)

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money-how-instagram-and-youtube-disrupted-child-labor-laws> accessed 24 April 2023

<sup>8</sup> Crystal Abidin, ‘familygoals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor’ (2017) 3(2) Social Media + Society <<https://journals.sagepub.com/doi/epub/10.1177/2056305117707191>> accessed 28 April 2023

<sup>9</sup> Abidin (n 8)

<sup>10</sup> NCIB, ‘Labour Laws in India’ 9 <[https://ncib.in/pdf/ncib\\_pdf/Labour%20Act.pdf](https://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf)> accessed 20 April 2023

<sup>11</sup> Forouzan Yazdanipour and others, ‘Digital Labour and The Generation of Surplus Value on Instagram’ tripleC <<https://www.triple-c.at/index.php/tripleC/article/view/1304/1479>> accessed 5 May 2023; Antti Paakkari and others, ‘Digital labour in school: Smartphones and their consequences in classrooms’ (2019) 21 Learning, Culture and Social Interaction <<https://www.sciencedirect.com/science/article/pii/S221065611830059X>> accessed 1 May 2023

which includes both fun and work.<sup>12</sup> There is also a distinction which needs to be drawn between productive and unproductive fun. With the advancement of technology, leisure activities like playing video games can be monetised.<sup>13</sup> This is possible because the product of playbour is data which is sold to advertisers as a commodity. This helps corporations tailor advertisements to align with the user's activity allowing targeted advertisements. This forms a core part of the revenue generation model of many social media platforms.<sup>14</sup> Content creation is a major way in which companies reach their target audience. Marketing agencies are now using child influencers to sell toys and other products for both children and adults.<sup>15</sup> An example in India is Kyra Kanojia's channel where she reviews toys. A scan of her videos shows that since her channel has grown, she has done sponsored posts where toys are sent to her for free or videos are such which are essentially advertisements for brands.<sup>16</sup>

One may argue that since the creator owns the means of production, alienation does not take place. However, the involvement of brands means that certain guidelines need to be followed which may result in a product that the creator may or may not identify with, hence the alienation.

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<sup>12</sup> Christian Fuchs and Sebastian Seignani, 'What is Digital Labour? What is Digital Work? What's their Difference? And why do these Questions Matter for Understanding social media?' (2013) 11(c) tripleC 237, 237 <<https://www.triple-c.at/index.php/tripleC/article/view/461>> accessed 2 May 2023; Lorraine Charles and others, 'Digitalization and Employment: A Review' (ILO, 2022) 22 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_854353.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_854353.pdf)> accessed 2 May 2023

<sup>13</sup> Kücklich (n 5).

<sup>14</sup> Fuchs (n 12), 238.

<sup>15</sup> Shreya Basak, 'Money, Fame but No Safety Net: The Murky Market of Kid Influencers' (*Outlook*, 14 November 2022) <<https://www.outlookindia.com/national/money-fame-but-no-safety-net-the-murky-market-of-kid-influencers-news-237097>> accessed 28 April 2023

<sup>16</sup> Kyrascope Toy Reviews, 'Kyrascope Toy Reviews India Harry Potter Wizard Training Wands Toy' <<https://www.youtube.com/watch?v=FKcFE9MKT9g>> accessed 2 May 2023; 'Kyra Kanojia for Max Kids World: Kyrascope Reviews' <<https://www.youtube.com/watch?v=w2aWxmfofIM>> accessed 2 May 2023

## Monetization

Another view has emerged under which the fact of monetization of kid's activities is seen as enough to bring it under regulation.<sup>17</sup> While this may seem like a compelling argument, it also prompts two key questions. First, whether these children can be considered as having a relationship of employment. Second, if the first question is answered in the affirmative, who is the employment relation with? Answering these questions is necessary if one is to be brought under the ambit of labour law.

Stated at a general level, a relationship of employment can be discerned if work is done by a person under certain directions for remuneration. It must be stated that many more factors beyond these three are considered when determining an employment relationship.<sup>18</sup> On consideration of all factors, currently, even adult influencers are not considered employees but independent contractors.<sup>19</sup> The lack of control over the process and product of work stands out in the case of influencers. Perhaps, we would need to re-imagine this idea of control which is traditionally part of employment tests. Control over children's content creation can manifest through the two mediums of monetization. First, branded partnerships. It has been indicated that children are engaging in work because they have certain deliverables due by a deadline.<sup>20</sup> Second, through platforms like Instagram, YouTube, and Facebook. It has been argued that platforms which have a role in controlling the income

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<sup>17</sup> Wong (n 7).

<sup>18</sup>'Employment Relationship' (*ILO*) <[https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS\\_CON\\_TXT\\_IFPDIAL\\_EMPREL\\_EN/lang-en/index.htm](https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang-en/index.htm)> accessed 10 May 2023

<sup>19</sup> --, 'Digitally enabled new forms of work and policy implications for labour regulation frameworks and social protection systems' (*ILO*, 20 September 2021) <<https://www.un.org/development/desa/dspd/2021/09/digitally-enabled-new-forms-of-work-and-policy-implications-for-labour-regulation-frameworks-and-social-protection-systems/>> accessed 10 May 2023

<sup>20</sup> Devina Gupta, 'The rise of India's kid influencers' BBC (29 December 2020) 20:17-21:27 <<https://www.bbc.co.uk/programmes/p092nvnk>> accessed 3 May 2023

generated should be viewed as ‘joint employers’ of children.<sup>21</sup> The argument is made specifically for YouTube as it exercises considerable control over earnings through its monetization and community guideline policies. It can take certain actions to take the video down in which case the creator makes no money at all.<sup>22</sup> The argument seems to be that since the level of control is this high, YouTube is responsible to child influencers as an employer.<sup>23</sup> The above does suggest that child influencers may in some cases satisfy the test of employment if a more expansive idea of control is considered. There is a need to take such a view because the work of children is concerned. The next section elaborates on this.

### **Need for Regulating Work of Child Influencers**

Children are provided with extra protection because they are considered a vulnerable group. This vulnerability is rooted in their dependence on others for fulfilment of their most basic needs and decision-making. The vulnerability is also been described as situational as it may arise from being placed in specific situations.<sup>24</sup> One such situation is that of being a child actor and/or influencer. Though exceptions have been provided, there are still dangers in this line of work which impact children more than adults.<sup>25</sup> Particularly in the context of child influencers, two reasons emerge which highlight the need for regulation. First, the

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<sup>21</sup> Wong (n 7).

<sup>22</sup> Charles (n 12); Hannah Johnston and others, ‘Working on Digital Labour Platforms’ ETUI (Brussels 2020) 16 <[https://www.etui.org/sites/default/files/2021-02/Working%20on%20digital%20labour%20platforms-A%20trade%20union%20guide%20for%20trainers%20on%20crowd-%2C%20app-%20and%20platform-based%20work\\_2021.pdf](https://www.etui.org/sites/default/files/2021-02/Working%20on%20digital%20labour%20platforms-A%20trade%20union%20guide%20for%20trainers%20on%20crowd-%2C%20app-%20and%20platform-based%20work_2021.pdf)> accessed 30 April 2023

<sup>23</sup> Wong (n 7).

<sup>24</sup> Alexander Bagattini, ‘Children’s well-being and vulnerability’ (2019) Ethics and Social Welfare <<https://www.tandfonline.com/doi/full/10.1080/17496535.2019.1647973>> accessed 5 May 2023

<sup>25</sup> International Labour Office, Sectoral Policies, ‘The Future of Work in the Arts and Entertainment Sector – Report for the Technical Meeting on the Future of Work in the Arts and Entertainment sector’ (Geneva, 13–17 February 2023) 62 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/publication/wcms\\_865323.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_865323.pdf)> accessed 5 May 2023

child influencer market is lucrative but currently, there are no guidelines which regulate their working conditions. This renders them open to abuse by parents and companies.<sup>26</sup> A few of these cases have been documented in the USA.<sup>27</sup> While all parents may not inflict abuse, due to deadlines set by sponsored posts, they may push children to perform when they do not wish to.<sup>28</sup> Further, as there is little to no representation of children in trade unions, they do not reap the benefits which arise from collective bargaining.<sup>29</sup> Second, an online presence brings with it considerable negative exposure. Interviews with Indian child influencers show that these kids face bullying from their peers at school and receive hate comments online. They may also receive threats of kidnapping and physical harm.<sup>30</sup> All of this would surely have a negative impact on the mental health and well-being of the child. In light of the above factors, it seems clear that there is a need to protect child influencers.

The next section studies the law enacted in France to regulate child influencers under labour law. It also discusses the law on child actors in India and guidelines released by the National Commission for Protection of Child Rights ('NCPCR') which covers child influencers.

## **The French Model**

In 2020, France enacted a law to protect children under the age of 16 from commercial exploitation on the internet. It sought to protect the income, working conditions, and

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<sup>26</sup> Basak (n 15); Anish Vats, 'India's 'kidfluencers' are raking in millions. No law to protect them' *The Print* (27 April 2022) <<https://theprint.in/campus-voice/indias-kidfluencers-are-raking-in-millions-no-law-to-protect-them/931326/>> accessed 10 May 2023.

<sup>27</sup> Masterson (n 4).

<sup>28</sup> Wong (n 7).

<sup>29</sup> International Labour Office (n 25), 62.

<sup>30</sup> Anesha George, 'Meet India's young influencers, who've taken YouTube by storm' *Hindustan Times* (28 April 2019) <<https://www.hindustantimes.com/more-lifestyle/meet-india-s-youngest-influencers-who-ve-taken-youtube-by-storm/story-pMA6KIN7QQtBpvKwtrCceI.html>> accessed 2 May 2023

privacy of the children.<sup>31</sup> Drafting this law prompted French legislators to wrestle with the same questions discussed above - whether children's activity online was work or leisure. In answering this, they had to investigate concepts of leisure and employment as understood in French law. Employment relations in France focus on three key elements of work carried out, compensation and a relationship of subordination. It also includes that there must be an obligation to perform the work under pre-defined directions. The key element which was absent in the case of most child influencers was a relationship of subordination as they worked with their parents. The possibility of viewing parental authority and supervision as subordination to work was ruled out. Since there was no relationship of employment, they could not be covered under the existing labour laws. However, the French Parliament recognised that this was a major regulatory gap which needed to be addressed.<sup>32</sup> It approached this issue by widening the scope of protection and amending sections of its Labour Code.

## **Amendments to the Labour Code**

The French Labour Code has a general prohibition on children working. However, an exception for children in the entertainment industry has been created. Article L7124-1 requires that children under 16 can be engaged in entertainment activities with prior permission of the administrative authority. This Article was amended to include child influencers. After the amendment, an employer who wishes to engage children in the production

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<sup>31</sup> Official Bulletin, Law No. 2020-1266 of 19 October 2020, aiming to regulate the commercial exploitation of the image of children under sixteen on online platforms <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042439054>> accessed 6 March 2023

<sup>32</sup> Marie-Andree Weiss, 'Pour les Enfants: A New French Law Regulates Influencers Who Are Under the Age of 16' (1 February 2021) <<https://www.maw-law.com/uncategorized/pour-les-enfants-a-new-french-law-regulates-influencers-who-are-under-the-age-of-16/>> accessed 7 May 2023

and dissemination of audio-visual recordings on a video-sharing platform for profit must also obtain permission.<sup>33</sup>

To protect children who work under their parents and not an employer, an *ad hoc* framework has been set-up.<sup>34</sup> In cases where content mainly featuring the child exceeds a prescribed time period or income received directly or indirectly, legal representatives must make a declaration to the concerned authority.<sup>35</sup> Therefore, lack of an employment relationship does not preclude children from protection.<sup>36</sup> Parents are required to deposit the child's income to the *Caisse des dépôts et consignations*, a public sector financial institution, if income exceeds a prescribed threshold. The income is managed in a fund till the child attains majority.<sup>37</sup> The competent authority may allow legal representatives to access a part of the child's income. Where there is an obligation to deposit the earnings to *Caisse*, advertisers who use the child's platform for product placement are required to pay the child's remuneration to the account directly. Non-compliance with these requirements attracts high fines. The law also envisages a more active role to be played by the platforms by adopting charters to promote user compliance with the legal framework.<sup>38</sup>

The next section delves into the Indian law on child labour. The law in India currently only regulates the labour of child artists. It also discusses the NCPCR draft guidelines.

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<sup>33</sup> Section 1, 5° Law No. 2020-1266 (n 31).

<sup>34</sup> National Assembly, 'Report on the Proposal for a law aims at regulating the commercial exploitation of the image of children under the age of sixteen on online platforms' ('Studer Report') <[https://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/115b2651\\_rapport-fond#\\_Toc256000005](https://www.assemblee-nationale.fr/dyn/15/rapports/cion-cedu/115b2651_rapport-fond#_Toc256000005)> accessed 8 May 2023

<sup>35</sup> Section 3, 1° and 2°, Law No. 2020-1266 (n 31).

<sup>36</sup> Section 3, II, Law No. 2020-1266 (n 31).

<sup>37</sup> Section 3, III, Law No. 2020-1266 (n 31).

<sup>38</sup> Section 4, Law No. 2020-1266 (n 31).

## **Legal Framework on Child Labour in India**

One of the Fundamental Rights under the Indian Constitution is that children under the age of 14 shall not be made in a mine, factory, or any other dangerous work.<sup>39</sup> The concern regarding children being forced into hazardous occupations is also reflected in the Directive Principles of State Policy in Part IV of the Constitution. Article 39(e) directs the State to enact measures to ensure that children are not taken advantage of and not forced into vocations which are not appropriate for their age. In the same vein (f) provides that policies should be designed in a manner to provide children with the right set of circumstances to be healthy, and enjoy freedom and dignity. It also provides that childhood must be safeguarded “against exploitation and against moral and material abandonment.” To give expression to these promises and particularly Article 24 of the Constitution, the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (‘CALPRA, 1986’) was enacted.<sup>40</sup>

### **Child and Adolescent Labour (Prohibition and Regulation) Act, 1986**

The Act distinguishes between a ‘child’ and an ‘adolescent.’ A person under the age of 14 is a child under the Act.<sup>41</sup> Section 3(1), CALPRA 1986 prohibits any child from working in an occupation or process.<sup>42</sup> The section has carved out two exceptions. First, where the child after school and/or during vacations assists their family or its enterprise in non-hazardous work. Second, where the child is an artist. A range of activities spanning from audio-

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<sup>39</sup> Constitution of India 1950, art 24.

<sup>40</sup> CALPRA 1986

<<https://www.indiacode.nic.in/bitstream/123456789/1848/1/A1986-61.pdf>>  
accessed 6 March 2023

<sup>41</sup> s. 2(ii) mentions that a child is either fourteen or an age which is specified under the Right of Children to Free and Compulsory Education Act. Currently, that Act also defines child as a person between the age of 6 and 14.

<sup>42</sup> s. 3, CALPRA 1986 (n 39).

visual entertainment to sports are covered under this. An artist has been defined as a child who engages in any work as an actor, singer, or athlete either recreationally or professionally. A reading of the section gives the impression that the definition is expansive enough to cover child influencers as it mentions ‘any other activities.’ However, it is a limited definition as the Child Labour (Prohibition and Regulation) Amendment Rules, 2017 (‘2017 Rules’) has defined the remaining scope.<sup>43</sup> Other activities include participation in sports competitions, shows of any kind on television and radio, drama shows, appearances as anchors, and activities notified by the Central Government. Therefore, currently, child influencers are not regulated by the CALPRA 1986.

## **Adolescents**

A person who has completed 14 years but not yet 18 has been defined as an adolescent. Section 3A prohibits adolescents from working in hazardous work or occupations.<sup>44</sup> Since audio-visual production does not fall within the Schedule, it is reasonable to assume that adolescents can work as influencers. The hours of work have been laid down in Section 7.<sup>45</sup> However, neither section 7 nor the 2017 Rules provide guidance on regulating the work of adolescents in audio-visual production. As a result, influencers under 18 are not subject to any regulation. NCPDR took note of these gaps and released certain guidelines.

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<sup>43</sup> 2017 Rules

<[https://upload.indiacode.nic.in/showfile?actid=AC\\_CEN\\_6\\_6\\_00034\\_198661\\_1517807326525&type=rule&filename=The%20Child%20Labour%20\(Prohibition%20and%20Regulation\)%20Amendment%20Rules,%202017\\_1.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_6_6_00034_198661_1517807326525&type=rule&filename=The%20Child%20Labour%20(Prohibition%20and%20Regulation)%20Amendment%20Rules,%202017_1.pdf)> accessed 6 March 2023

<sup>44</sup> s. 3A, CALPRA 1986 (n 39).

<sup>45</sup> s. 7, CALPRA 1986 (n 39).

## NCPCR Guidelines

On 18<sup>th</sup> May 2023, the National Commission for Protection of Child Rights (‘NCPCR’) notified the Guidelines for child and adolescent participation in the entertainment industry or any commercial entertainment activity.<sup>46</sup> These guidelines explicitly recognise involvement in Over the Top (OTT) platforms and on social media. The guidelines seem to be an attempt to harmonise work-related regulations with laws on information technology, juvenile justice, and the protection of children from sexual offences.<sup>47</sup> The guidelines extend provisions of CALPRA and 2017 Rules which lay down the conditions for service for child actors and those engaged in family enterprises.<sup>48</sup> Guidelines envisage that children create content for social media as a part of their family enterprise. Family enterprise has been defined as “work, profession, manufacture or business performed by family members along with others.”<sup>49</sup> Rule 2B provides the condition of children helping with family enterprises. It mentions that the child should not work in hazardous occupations or in the production stage of a supply chain. This rule has been extended to include children engaged in social media content creation under Guideline 13. It provides that a child shall not work during school hours and between 7 p.m. to 8 a.m. It is specified that the child should not be made to work if it negatively impacts education, homework and extra-curriculars. It provides that the child must be able to take adequate rest and shall not work for more than three hours.<sup>50</sup> In matters of education, Rule 17C(1)(i) has been extended to child influencers. It imposes an obligation on the school Principal to report to the District Magistrate if a child is

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<sup>46</sup> National Commission for Protection of Child Rights (NCPCR), ‘Guidelines for child and adolescent participation in the entertainment industry or any commercial entertainment activity’ (‘NCPCR Guideline’) (18 May 2023) <[https://ncpcr.gov.in/uploads/16844053596465fc6f115d1\\_guidelines-for-child-and-adolescent-participation.pdf](https://ncpcr.gov.in/uploads/16844053596465fc6f115d1_guidelines-for-child-and-adolescent-participation.pdf)> accessed 18 May 2023

<sup>47</sup> NCPCR Guideline Introduction (n 46)

<sup>48</sup> NCPCR Guideline 12 (n 46).

<sup>49</sup> s. 3 Explanation (b), CALPRA 1986 (n 39).

<sup>50</sup> NCPCR Guideline 12 (n 45) and Rule 2B, 2017 Rules (n 42).

absent for thirty days continuously without prior information.<sup>51</sup>

Three rules which are ordinarily applicable to child artists under Rule 2C have been extended to child influencers under the guidelines. First, an obligation has been placed on the producer to obtain permission from the District Magistrate for audio-visual media production involving children. This would include child influencers. Second, like in the case of films, the production is required to provide a disclaimer within the social media content that appropriate measures were put in place to protect children from any ill-treatment. Third, under Rule 2C(f), 20% of the child artist's income must be deposited by the production or event directly into the child's fixed deposit account in a nationalised bank. The child is provided access to this money at the age of majority, 18. In the case of child influencers, the responsibility of depositing money falls on either the organization or family depending on who has created and published the content.<sup>52</sup>

Even after notification, the effectiveness of these is in question as the binding nature of these guidelines is unclear. The NCPCR is the creation of the Commissions for Protection of Child Rights Act, 2005. The function of this statutory body has been enumerated in Section 13. Section 13(b) provides that the Commission shall be responsible for scrutinizing and evaluating the laws enacted for the protection of children. It is also tasked with 'recommending measures for their effective implementation.'<sup>53</sup> This language seems to indicate that the guidelines may not be binding by themselves but may require additional action from the government. A report released by the NCPCR supports this interpretation. It acknowledged that

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<sup>51</sup> NCPCR Guideline 13 (n 44), Rule 17(1)(i) 2017 Rules (n 42).

<sup>52</sup> NCPCR Guideline 14 (n 45).

<sup>53</sup> Child Rights Act 2005, s 13(b).

guidelines required prompt government response.<sup>54</sup> This may lead one to question which government is required to act. An examination of the Seventh Schedule seems to indicate that matters related to minority and infancy fall under List III or the Concurrent List.<sup>55</sup> However, certain reports suggest that it could also fall within List II or the State List.<sup>56</sup> Either way, for the guidelines to become operational, it will require action from the Central or State government. Still, cumulatively, the guidelines are a first step towards regulating a space which has been completely unregulated up till now.

Having discussed the French law on child influencers and the NCPCR guidelines, the next section highlights certain aspects from both which should be considered while drafting a law in India.

## **Suggestions**

First, like in France, the scope of the law should be wide enough to cover child influencers who are not strictly in a relationship of employment under Indian law. However, in doing so, child influencers should not be characterised as working in a family enterprise as done by the NCPCR guidelines. By categorising the involvement of children on social media as a family enterprise, production-based protections provided to child actors are sidestepped.<sup>57</sup> This is important because the protection provided to child actors is much more stringent than those provided to children working in family enterprises.<sup>58</sup> It also ignores

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<sup>54</sup> Prof. Shantha Sinha, 'The First Six Years (2007-2013)' National Commission for Protection of Child Rights, 8 (16 May 2023) <[https://ncpcr.gov.in/uploads/165648998662bc0802924e6\\_national-commission-for-protection-of-child-rights-ncpcr-the-first-six-years-2007-2013-641-kb.pdf](https://ncpcr.gov.in/uploads/165648998662bc0802924e6_national-commission-for-protection-of-child-rights-ncpcr-the-first-six-years-2007-2013-641-kb.pdf)> accessed 12 May 2023

<sup>55</sup> Constitution of India 1950, Entry 5

<sup>56</sup> Dr. Savita Bhakhry, 'Children in India and their Rights' National Human Rights Commission (2006) 19 <<https://nhrc.nic.in/sites/default/files/ChildrenRights.pdf>> accessed 12 May 2023; Sinha (n 54), 8.

<sup>57</sup> Rule 2C, 2017 Rules (n 42).

<sup>58</sup> Rule 2C(a) and (e), 2017 Rules (n 42).

that at that time brands are built solely around the child and not the family.<sup>59</sup> An alternative could be that rather than distinguishing between organization and family-produced content, the focus should be on whether the child is the ‘main subject’ of the content, a line has been taken by French law.<sup>60</sup>

Second, the law should account for adolescent influencers specifically. While adolescents may have more capacity than children, their minority still makes them vulnerable. It is reasonable to assume that children (those under 14 years of age) would require more support and assistance from their parents in filming, scripting and production as compared to adolescents (above 14, below 18).<sup>61</sup> However, this line is difficult to draw as parents are inevitably involved in content directly or indirectly even for adolescents. Further, adolescents may be dealing with companies more than children which prompts a further need for protection due to unequal bargaining power.<sup>62</sup>

Third, a more robust system to regulate the working conditions of child and adolescent influencers must be formulated. This is especially challenging as most of the work happens within the house under the parents. Drawing on both the French law and NCPCR guidelines, the first step in this system should be permission from an authority like the District Magistrate. This creates at least some record of the child/adolescent and information about the activities.

Fourth, there is also a need to acknowledge the role of intermediaries like digital agencies which may facilitate brand partnerships and act as a liaison between the

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<sup>59</sup> Few examples of child/adolescent centric content channels include: Samreen Ali <<https://www.youtube.com/@SamreenAli142>>; KichaTube HD <<https://www.youtube.com/@KichatubeHD/videos>>; Learn with Amar <<https://www.youtube.com/@LearnwithAmar/videos>> accessed 11 May 2023.

<sup>60</sup> Section 3, Law No. 2020-1266 (n 31).

<sup>61</sup> Masterson (n 4), 592.

<sup>62</sup> Gupta (n 20).

companies and child/adolescent influencers.<sup>63</sup> In such situations, a duty of care needs to be imposed on the agency, or company which is engaging the child/adolescent influencer and the parents.

Fifth, on remuneration, currently, the onus is on the parents to open the account with a nationalised bank. However, there could be cases where an account is not made due to a variety of reasons. In such a situation, a fund like the Coogan Fund should be set up. The Coogan Fund is related to the Coogan Law. This law was enacted in California which mandates caretakers to create a trust account. The account is governed by stringent investment regulations.<sup>64</sup> In case the account is not set-up the employer can deposit the money in a state-Coogan Fund. The state is obligated to contact the child once they attain majority and disburse the earnings to them.<sup>65</sup> Perhaps a similar model could be explored in India. This would ensure that children who do not have accounts are not uncompensated for their work.

## **Conclusion**

This paper is an attempt at highlighting certain regulatory challenges which maybe encountered while drafting a law for the protection of child influencers. Given that this landscape is fast-developing and evolving, there are a lot of aspects that require further research which should inform the law. This includes more information on the number of child/adolescent influencers in India, average age groups, manner of operation, scope of involvement of parents, etc. The drafting process itself should involve extensive consultation from all stakeholders including child/adolescent influencers, their parents, platforms, advertising agencies and child's rights organizations. The

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<sup>63</sup> Gupta (n 20).

<sup>64</sup> Protecting Your Child's Earnings, Morgan Stanley, <https://www.morganstanley.com/articles/trust-account-for-child-performer>.

<sup>65</sup> Masterson (n 4), 590.

law should also ensure that it delivers on India's existing obligations emanating from international instruments. This becomes even more crucial in the absence of authoritative international guidance on child influencers like an ILO Convention or Recommendation.<sup>66</sup> It should adhere to the first principles of child protection while also accounting for challenges peculiar to India.

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<sup>66</sup> International Labour Office (n 25), 62.

# **Autonomy in Weapon Systems: The Unpredictable and Unaccountable Confluence of Mechanization of Weapons and International Humanitarian Law**

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## **Abstract**

This essay delves into the complex intersection of autonomous weapon systems (AWS) and international humanitarian law (IHL), exploring the ethical, moral, and legal dilemmas associated with the mechanization of weapons. The essay scrutinizes their legality based on fundamental principles like the distinction and proportionality in the absence of clear IHL covenant governing AWS. The principle of distinction, crucial in safeguarding civilians during armed conflict, is challenged by the AWS's inability to precisely differentiate between combatants and civilians. The principle of proportionality presents challenges in the context of unpredictable AWS actions. The essay also examines the accountability vacuum in AWS scenarios, questioning the roles of system operators, military commanders, and programmers. The Martens Clause is highlighted as a crucial ethical consideration, emphasizing the importance of humanity and public dictate in the absence of specific AWS-related laws. Finally, the essay advocates for a careful balance between human agency and automated systems, emphasizing the imperative of international cooperation to mitigate the risks associated with AWS in armed conflicts.

## **Keywords**

AWS, Humanitarian Law, Armed Conflict, International Law, AI

## Introduction

Unpredictable, unreliable, unaccountable- the realm of autonomous weapon systems (“AWS”) is laced with the dilemmas of ethics of war, moral responsibilities and legal obligations. Currently, there is no prescribed covenant under international humanitarian law (“IHL”) that governs the usage of AWS- which leads to a derisive view regarding their legality. As of 2023, despite numerous attempts having been made to lay down the criteria for determining what qualifies as an AWS, there has been no concrete conclusion.<sup>1</sup> Therefore, even though the usage of such weaponry has been questioned innumerable times on accounts of morals and ethics, the following essay will examine the growing usage of such systems strictly in light of the underlying legal responsibilities of states under IHL, considering the unweighted merit of autonomous artificial intelligence (“AI”) and weaponry.

AWS can be defined as “Any weapon system with autonomy in its critical functions—that is, a weapon system that can select (search for, detect, identify, track or select) and attack (use force against, neutralise, damage or destroy) targets without human intervention.”<sup>2</sup> The world in itself is defining new limits for “autonomy”, especially with the increasing advent of artificial intelligence, thus it is pertinent to develop a few more definitions for the term, which encompass the limits set by the abovementioned definition.

However, by defining the broad subject matter of the debate over AWS without having to directly address any specific legal issues, the definition offers a helpful

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<sup>1</sup> Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System Geneva, 6-10 March, and 15-19 May 2023 Item 5, Revised working paper Submitted by Austria, n.d.

<sup>2</sup> Neil Davison, ‘A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law’ (2018) 30 UNODA Occasional Paper 5.

foundation for a legal analysis. In that regard, the definition is not meant to make assumptions about the degree of autonomy in weapon systems that may or may not be considered legal but offers a level playing field in deciding the ambit of inclusion. Thus, it would form a strong foundation to develop further arguments, as has been attempted below.

## **The Initial Trepidations- What is Antithetical to IHL**

The initial legal argument levied against AWS rests on the two primary concepts of IHL: the principle of distinction and the principle of proportionality.<sup>3</sup> The crux of the arguments essentially prioritises the involvement of human agency in armed conflict due to the human nature of conflict, the requisite rules and conventions, and the underlying quantitative and qualitative judgement necessary in conflict.

## **The Principle of Distinction**

The *principle of distinction* is an established norm<sup>4</sup> under customary international law and is applicable in cases of both international and non-international armed conflict<sup>5</sup>, and forms the first safety net for civilians during armed conflict. There needs to be the utmost distinction between civilians and combatants- attacks on the former being in contravention of IHL, with the immunity of civilians from direct attack as one of the basic rules of international humanitarian law<sup>6</sup>. However, when AWS comes into the picture, the distinction aspect stands

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<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 UNTS 3, entered into force December 7, 1978, arts. 48 and 51(4-5).

<sup>4</sup> Prosecutor v Katanga and Ngudjolo [2012] ICC Case No ICC-01/04-01/07, Judgment (International Criminal Court, Trial Chamber II, 21 November 2012)

<sup>5</sup> 'Customary IHL - Rule 1. The Principle of Distinction between Civilians and Combatants' (ICRC.org2022) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> accessed 4 November 2022.

<sup>6</sup> **MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM AND OTHERS, Israel, Military Court at Ramallah**

questioned. The distinction has blurred with the advent of AWS, for the ability of an AWS to differentiate between civilians and combatants when built purely to attack.

Initially, the question should be rephrased to a prospective, inventive aspect- is the creation of such AI-AWS possible where the distinction between civilians and combatants is made with precision? However, the prospective nature of the question and the futuristic approach are essentially hypothetical. Concepts and contingencies have never been the principles of war, and in the current picture, there exists no AWS mechanism known that is impeccable in determining the distinction between a civilian and a combatant- something even human soldiers can falter at. Further, gauging the needs of *hors de combat*<sup>7</sup> and mediating the attacking nature and intensity is something that relies primarily on human understanding and judgement- something AWS are incapable of.<sup>8</sup> Even if there were to be an AWS with a mechanism precise enough to distinguish military insignia/symbols/uniforms, there would be no protection from it being extended to ***hors de combat***- who bear the same symbols but have lost the ability to combat. Despite having the prerequisite of objective judgements of facts<sup>9</sup> during the conflict as the premise for decision-making, the existence of case-to-case basis analysis by human soldiers stands vastly different from that of AWS.

Owing to the increasing involvement of civilian areas and residences as battlegrounds, the probability of the intersection of belligerents and civilians stands heightened. The recent years have seen increasing turmoil across the globe with indiscriminate involvement of

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<sup>7</sup> Human Rights Watch and IHRC, *Making the Case: The Dangers of Killer Robots and the Need for a Preemptive Ban* (December 2016), [https://www.hrw.org/sites/default/files/report\\_pdf/arms1216\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/arms1216_web.pdf)

<sup>8</sup> Afonso Seixas-Nunes, *The Legality and Accountability of Autonomous Weapon Systems* (2022).

<sup>9</sup> Geneva, 'EXPERT MEETING AUTONOMOUS WEAPON SYSTEMS TECHNICAL, MILITARY, LEGAL and HUMANITARIAN ASPECTS' (2014).

civilians. For instance, the Israel-Palestine conflict witnessed the civilian death toll rising to 1,200 deaths in Israel and 21,507 deaths in Gaza.<sup>10</sup> The evolution of war strategies has also increasingly used the civilian protection aspect in their favour, having soldiers and combatants dressed as civilians.<sup>11</sup> Despite violating IHL, the strategy minimises damage to the self while increasing harm to the other end. The conclusion then becomes simple- when humans have constantly been frazzling out in upholding the principle of distinction during the conflict, AWS- which inherently functions on the identification of set "characteristics" and lacks the qualitative, moment-mediated judgement- cannot act in consonance with the IHL and principle of distinction.

## **The Principle of Proportionality**

Similarly, the ***principle of proportionality*** is another root of IHL, where the mandate is that any attack must be scaled against the civilian harm metric.<sup>12</sup> Thus, civilian harm cannot outweigh the military advantage during attacks.<sup>13</sup> The basis of this analysis is subject to dynamic situations and infinite possibilities that may arise- where due care needs to be according to the battlefield's nature, location and demographics, the environmental impact assessment, and numerous other contingencies that may arise. These two principles- proportionality and distinction- in combination accrue the principle of precautions during the attack.

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<sup>10</sup> CNN, 'Title of the Article' (2023) [published on 7 November 2023] CNN <https://edition.cnn.com/2023/11/07/middleeast/palestinian-israeli-deaths-gaza-dg/index.html> accessed 17 November, 2023.

<sup>11</sup> Ido Rosenzweig, *Combatants Dressed as Civilians?* under International Law, [https://en.idi.org.il/media/6191/combatants\\_dressed\\_as\\_civilians.pdf](https://en.idi.org.il/media/6191/combatants_dressed_as_civilians.pdf).

<sup>12</sup> Article 51(5)(b) of the 1977 Additional Protocol I, ICRC.

<sup>13</sup> Bonnie Docherty, 'The Need for and Elements of a New Treaty on Fully Autonomous Weapons' (*Human Rights Watch* June 2020) <[https://www.hrw.org/news/2020/06/01/need-and-elements-new-treaty-fully-autonomous-weapons#\\_ftn1](https://www.hrw.org/news/2020/06/01/need-and-elements-new-treaty-fully-autonomous-weapons#_ftn1)> accessed 4 November 2022.

For AWS, the same judgement cannot be effectively mediated unless the attacking sector has designated weapons for infinite battlefields and situations- which is not just impossible to quantify and create but, at the very outset, is a massively improbable situation. Thus, where does AWS stand on the scale of preservation of these principles is gravely unclear.

The abovementioned principles thus create the liability of human agency. When the question of **accountability** strikes, IHL's mandate has always been to hold human actors accountable in cases of war crimes or grave breaches of the Geneva Conventions.<sup>14</sup> In the case of AWS, there exists no mechanism to strike an accountability stroke at one person. Even if one position, as would later be expounded upon- is culled out to be prosecuted for the deployment of an AWS, no "real" accountability would exist as IHL mandates the attack be carried out in its entirety by the accused. Thus, accountability as a background stands vague and imprecise in the realm of allegedly precise machinery.

### **The Governing Principle- Martens Clause**

However, in cases of the utmost unpredictability, is wherein the Martens Clause comes to the fore<sup>15</sup>. The Martens Clause is of extreme relevance to the issue considering there are no codified or specified laws on the AWS or their usage under the IHL. The clause simply prescribes the primacy of principles of humanity and public dictate in cases where there are no specific IHL principles governing a subject.<sup>16</sup> Finding its origin at the

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<sup>14</sup> Prosecutor v Ongwen [2021] ICC Case No ICC-02/04-01/15, Judgment (International Criminal Court, Trial Chamber IX, 4 February 2021)

<sup>15</sup> IHRC, *Heed the Call: A Moral and Legal Imperative to Ban Killer Robots* (August 2018), [https://www.hrw.org/sites/default/files/report\\_pdf/arms0818\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/arms0818_web.pdf) accessed 5 November 2022

<sup>16</sup> International Committee of the Red Cross, *THE PRINCIPLES OF HUMANITY AND NECESSITY*, (2023), [https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/02\\_humanity\\_and\\_necessity-0.pdf](https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/02_humanity_and_necessity-0.pdf).

Hague Peace Conference of 1899, the Martens clause has been critical in defining the role of civilians in conflict, as it is the underscoring factor which ties principles of natural law with the positive norms of IHL.<sup>17</sup> This is also the arena where ethics and morals are questioned at their highest-principles of humanity having their roots in the general concepts of moral rights and wrongs concerning humans.

Due to the absolute lack of qualitative judgements, any AWS or AI-powered machinery cannot possibly be held accountable for violating the Martens Clause. Such systems have one job, and that is victory. Examining “victory” and “success” through the metrics of human life is morally and ethically incorrect. Despite the dearth of statutory protection, a human soldier in unprecedented circumstances could exercise, if not morally correct judgements but at least act in self-preservation. The destruction that may follow the usage of AWS would be arbitrary, to say the least, and would undermine the right to life, remedy and dignity as well.<sup>18</sup>

## **A Hypothetical Scenario- And Everything That Can Go Wrong**

The answer to the contentions raised above can be attempted with a hypothetical, which presumes infinite precision of the technology and AI involved. The world of AI is fast expanding and evolving, with ever-dynamic niches carving further specifications and pushing their boundaries. The inception of AWS, which is precise, reliable, and accurate, is not entirely impossible, if not in the near future, then somewhere further down the lane.

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<sup>17</sup> Rupert Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 37 International Review of the Red Cross 125.

<sup>18</sup> Human Rights Watch and IHRC, *Shaking the Foundations: The Human Rights Implications of Killer Robots* (May 2014), <[https://www.hrw.org/sites/default/files/reports/arms0514\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/arms0514_ForUpload_0.pdf)> accessed 5 November 2022

The entire debacle of AWS essentially revolves around existing weapons. However, for the sake of argument, let us assume that there exist hyper-precise mechanisms of distinction and proportion determination and that this technology is being actively used while manufacturing AWS. At the outset, the prospect seems enticing as it minimises human intervention on actual battlegrounds, minimises damages owing to the precise nature of the arsenal, and would reduce the costs massively due to specific targeting- among many other possible advantages. Now even if such weapons have been created, the question comes of state accountability and responsibility.

### **Expecting the Unlikely: Favouring AWS**

Evidence supports the assertion that conflicting states have been consistently violating the IHL and have tendencies of twisting and disregarding principles of protection in lieu of victory and garb of self-defence.<sup>19</sup> The past two years especially stand witness to it- with Russia blatantly invading Ukraine, to Israel's inhumane attacks in Palestine. Going back, the same instances have traced the history through Tigray, Nargono-Karabakh, Myanmar-amongst various others. Despite the inherent nature of the right of self-defence in international law, the right is only exercisable in case of an "apparent" threat<sup>20</sup>, i.e., a tangible, calculated analysis is done before attacking-something far from reality. The current paradigm rests more on asserting oneself towards victory. Now in such cases, how far will the advent of the hypothetically infinitely precise technology be positively used in the development of weapons has an obvious answer. States

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<sup>19</sup> International Committee of the Red Cross, Violations of IHL, International Committee of the Red Cross (2014), <https://www.icrc.org/en/war-and-law/international-criminal-jurisdiction#:~:text=When%20violations%20of%20IHL%20occur.>

<sup>20</sup> United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) art 51. .

would still serve and devise such AWS, which eventually benefit them<sup>21</sup>- with all their precisions.

### **Programmed to Kill: Shrouding Immorality**

Another popular contention raised in favour of AWS is that they might as well be programmed to suit IHL better. Due to the formulation of strict codes and programs, such weapons have a limited scope of functioning. They follow prescribed commands, which, experts presume, would be encoded in compliance with IHL.

However, if the previous situation is true, this assertion also falls flat here- considering that if the very programming disregards IHL, the machine becomes no less antithetical to IHL than a rogue soldier. A robot cannot hate<sup>22</sup>- but the questions of morality would still be in the hands of the creator. Even if the creator in a so-called 'peaceful' environment creates a robot<sup>23</sup>, the possibility of its ill-usage would still rest in the hands of other organs of conflict. This lack of a moral compass is argued in favour of AWS, considering they cannot decide adversely. However, this also brings forth the Martens Clause, as discussed previously. Further, considering the basis of Martens Clause to be public dictate, the situation worsens as opinion polls have hinted towards a disdain in the public towards the usage of AWS.<sup>24</sup>

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<sup>21</sup> Marco Sassóli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified in I Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified', vol. 90 (US Naval War College 2014) <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1017&context=ils>> accessed 4 November 2022.

<sup>22</sup> Ronald C. Arkin, *Ethical Robots in Warfare*, GEORGIA INSTITUTE OF TECHNOLOGY (Jan. 20, 2009), <http://www.cc.gatech.edu/ai/robot-lab/online-publications/arkin-rev.pdf>; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Interim Report, ¶ 20 (by Philip Alston), transmitted by Note of the Secretary-General, UN Doc. A/65/321

<sup>23</sup> *Ibid.*, n. 8

<sup>24</sup> Executive Summary, International Committee of the Red Cross (ICRC), 'Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?', ¶ 4, ICRC Database (2018).

The situation can stand worsened in case of hyperactive development of such systems, wherein the situation would transcend into *weapon amassment and uncontrolled proliferation*- and the gravest scenario of all might be the falling of these weapons into the hands of non-state armed groups<sup>25</sup> which brings us to the next question- accountability.

### **Mechanical Questions: Who is Responsible?**

Accountability can primarily be accorded to three positions in cases of attacks by AWS- the system operator, the military commander, and/or programmer. Nevertheless, there exist not just moral or ethical dilemmas to such liability accrual, but also the very legal principles of IHL stand questioned in this regime. Before delving deeper, it is crucial to study the regulatory principle, i.e., Rule 102<sup>26</sup> which states-

*“No one may be convicted of an offence except on the basis of individual criminal responsibility.”*

The above rule clarifies that any crime committed during an armed conflict asserts criminal responsibility solely on the doer. The basic principle of criminal law applies here, as has been upheld by the International Criminal Court as well<sup>27</sup> in case of individual liability, which includes “attempting to commit such crime, as well as assisting in, facilitating, aiding or abetting, the commission of a crime, along with planning and instigation” of the crime. When the same rule is read in the extension of Chapter 43 of the International Committee of

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<sup>25</sup> “Autonomous Weapons: An Open Letter from AI & Robotics Researchers”; Human Rights Watch and IHRC, *Making the Case*, pp. 29-30.

<sup>26</sup> Volume II, Chapter 32, Section O., 'Customary IHL - Rule 102. Individual Criminal Responsibility (ICRC.org2022)<[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule102#:~:text=It%20is%20a%20basic%20principle,the%20commission%20of%20a%20crime.>](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102#:~:text=It%20is%20a%20basic%20principle,the%20commission%20of%20a%20crime.>) accessed 5 November 2022.

<sup>27</sup> Art. 25, The Rome Statute of International Criminal Court.

the Red Cross' IHL database<sup>28</sup>, the question of responsibility gives out a few issues.

Considering that an individual is himself responsible for any manifestly unlawful act as per Rule 151<sup>29</sup>, and even for the carrying out of a manifestly unlawful order by a superior as per Rule 155<sup>30</sup>, the direct responsibility would then fall on the system operator first. However, the question of duress and undue influence stands rampant in such a scenario at the very inception, considering the relationship between a superior and a junior. Further, the liability also stands, morally and legally diluted, considering the proximate foreseeability of the damage. In cases of AWS, there might be an unpredictable failure of machinery, collateral damage, misidentification, and unreliable killings- among other flaws that might come to the fore. In such a case, any damage or detriment would merely be the result of the failure of technology and not the human per se- as is evident with a few existing technologies (like Phalanx) where a limited timeframe is accorded to the system operator<sup>31</sup>.

In such a case, neither the system operator nor the military commander can be held liable- their defence would rest in the non-foreseeability of the damage that occurred. Instead of this, the liability might be accorded to the

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<sup>28</sup> ., ICRC, Customary IHL Database, < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule151](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule151)> accessed 5 November 2022.

<sup>29</sup> Rule 151. "*Individuals are criminally responsible for war crimes they commit.*" Volume II, Chapter 43, Section A., ICRC, Customary IHL Database, < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule151](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule151)> accessed 5 November 2022.

<sup>30</sup> Rule 155. "*Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered.*" Volume II, Chapter 43, Section E., ICRC, Customary IHL Database, < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule151](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule151)> accessed 5 November 2022.

<sup>31</sup> Lieutenant Colonel Andre Haider, 'Autonomous Weapon Systems in International Humanitarian Law - Joint Air Power Competence Centre' (2018) 27 *The Journal of Joint Air Power Competence Centre* <<https://www.japcc.org/articles/autonomous-weapon-systems-in-international-humanitarian-law/#:~:text=Regardless%20of%20the%20presence%20or>> accessed 5 November 2022.

programmer for not creating an infallible system- another arbitrary accusation for the existence of human error is the very underscoring principle of human existence. Further, even if the program was 'impeccable', any last-minute situational dynamism cannot be predicted- so who is to be held liable in such a case remains to be seen.

Even if the two varying dictates of IHL are considered- one rooted in human action and the other focusing on minimising damages- the existence of liability still stands murky. The above discussion was of the school which accords responsibility to human agents.<sup>32</sup> The latter line of thought where the minimising of unlawful damages is the case. This interpretation reflects a more utilitarian approach to the nature and character of IHL rules governing AWS, emphasising the net humanitarian effect with less focus on whether that effect was produced by reliance on human agency.<sup>33</sup> The middle ground between the two rests on the accountability of human agency unless the usage of machinery would minimise damages. Nonetheless, the abovementioned analysis makes it clear that unless there are AWS-specific regulatory statutes in existence, there will always remain accountability loopholes. Even if the eleven rules of Group of Governmental Experts, 2019 are adopted, the determination of “user” in cases of AWS<sup>34</sup> would be challenging and might lead to the prosecution of innocents. The debate about human agency and its extent remains unanswered; thus, determining responsibility would produce inaccurate results.

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<sup>32</sup> Vincent Boulanin, Laura Bruun and Netta Goussac, 'AUTONOMOUS WEAPON SYSTEMS and INTERNATIONAL HUMANITARIAN LAW Identifying Limits and the Required Type and Degree of Human-Machine Interaction' (Stockholm International Peace Research Institute 2021).

<sup>33</sup> CCW Convention, 'Israel considerations on the operationalisation of the eleven guiding principles adopted by the Group of Governmental Experts, Aug. 2020

<sup>34</sup> Guiding Principle (d) states that: 'Human responsibility for decisions on the use of weapons systems must be retained since accountability cannot be transferred to machines. This should be considered across the entire life cycle of the weapons system.', Guiding Principle (d) quoted from CCW Convention (note 2), Annex IV

## **Towards the Future**

The dearth of AWS-specific legislation leads to extreme misuse and circumvention of liability. The absolute unpredictability during an attack furthers the admissibility of fault under IHL. Thus, as opposed to human combatants, AWS cannot be mandated, restricted, or accounted for during combat or attack. Their control should thus exist primarily at their very developmental stages. Declaring such weapons illegal would further the issue, amounting to double illegality of creation and usage- as their creation or usage will not stop any time in the near future owing to their efficiency and precision- being result oriented<sup>35</sup>.

## **Updating Warfare: Drafting Statutes that Keep Up**

The usage of AWS by irresponsible or despotic sovereigns or even NSAs poses an enormous responsibility. To keep a check on the same, the mandate needs to focus on creating warfare-specific AI statutorily bound to have integrated codes and mechanisms to comply with IHL. This needs to be the essential requirement for every AWS without exception. However, there also needs to be fault-specific provisions inculcated, considering the creation of such weapons might also be laced with human errors. Further, the distinction dimension needs to be refined and prioritised over the other aspects of machinery whilst compulsorily involving human agency at this stage. The suggestion is to include a two-step identification system- before the ultimate attack, the distinction needs to be verified by a human agent. Even though the suggestion would still lend errors in cases of hors de combat especially, it might be active in minimising civilian damage. The same would also make it comparatively more straightforward to accord human liability and aid in

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<sup>35</sup> Ibid, n. 15, ¶ 6

resolving the moral and ethical dilemma which rests on lending the power of life and death to machines.

### **Need for Human Intervention**

There needs to be a more active intersection of human agency, even in cases of AWS, especially in the deeper stages of combat. Further, a separate class of limited-automation weapon systems can exist, which can be used in cases where the battle proceeds in civil residential areas and the probability of civilian harm is higher. The proportion of human agency and decision involvement would also be higher in such cases. The existence of inherently and completely automated weapon systems would still be functional in areas lower in civilian populations.

The accretion of state liability would also rest in proportion determination. The existence of various weapons and the decision to deploy them during wartime is still in the hands of humans and might mitigate predictable proportional damage. The issue of unpredictability can be resolved only with highly advanced and precise AI- something that's development is contingent on future scientific developments. Until then, the state's responsibility would primarily rest with the developer, but the penalty should be designed with caution and consideration. The additional check and futuristic liability in cases of failure of such weapons might help reduce their development in fear of failure and prosecution. The human agency versus liability should exist based on internationally determined and agreed-upon metrics ensuring the difference between meaningful (to ensure the moral dilemma is resolved) and effective (to accord specific liability) is kept in mind.

## **Conclusion**

The nature of the above arguments is purely suggestive, and their relevance is apt even in cases where a certain constant evolution is witnessed. The questions raised and the attempted answers offer a peek into what lies in the dark underbelly of the regime of AWS. Indeed, where there is infinite potential in AWS to redefine the quantum of damage, the possibility of ill-use is always higher.

The principles of proportionality and principles of distinction come to the fore in line with the above statement. In lieu of developing AWS so sophisticated that they are in line with these principles, there will always exist the logical parallel of the absolute disregard of the same as well.

However, none of these suggestions can be helpful if the conflicting states are unwilling to comply. War is the ultimate resort and the vilest form of human cruelty, for it sees no class or creed but damages beyond measure. As long as conflicting states are not complying with IHL, the question of AWS or human agency stands redundant. Thus, the first step would be to ensure that the option of war is the least exercised and that reliance on soft power is increased.

# **Dead-End Arbitrations as an End in Themselves- Winds from Singaporean Shores and a Note of Caution**

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## **Abstract**

This essay explores a unique controversy in arbitration law arising out of conflicting decisions from the High Court of Singapore (SGHC) and Court of Appeal of Singapore (SGCA) on one side and the Bombay High Court (BHC) on the other. The controversy centers on whether certain disputes, considered non-arbitrable under Indian law, can be arbitrated by a Singapore-seated arbitral tribunal. The SGCA upheld the decision of the SGHC granting a permanent anti-suit injunction, favoring the arbitration in Singapore emphasizing the parties' intent to arbitrate, downplaying concerns about enforceability. However, the essay critiques this approach, arguing that the SGCA neglected the practical limitations and potential dead-end nature of the arbitration.

The paper questions the SGCA's pro-arbitration stance and its application if the dispute involved Singapore-domiciled parties on an issue not arbitrable in Singapore. The authors argue that while a pro-arbitration approach is essential, some judicial gatekeeping is necessary to prevent arbitration from becoming an end in itself, especially when faced with serious doubts about its propriety.

## **Keywords**

Arbitration, Alternative Dispute Resolution, Commercial laws, Singapore arbitration

## **Introduction**

A popular Indian online matrimonial platform has found itself at the centre of a unique controversy in arbitration law that has laid bare the incompatibility between two of the leading common law legal systems in Asia. What started as a shareholders' dispute between one of the founders of the company which runs the platform and a leading private equity investor in the company has thrown up interesting issues and led to conflicting judicial pronouncements from two of the most prominent island outposts of the erstwhile British Empire. Both Mumbai and Singapore are commercial hotspots with judiciaries keenly attuned to issues at the cutting edge of trade and commerce. While Singapore has already cemented its reputation as a commercial arbitration hub, Mumbai also has its sight set firmly on the tag. In this context, it becomes relevant to assess how their respective judiciaries are reacting to issues with ties across the Indian Ocean to both of them.

## **Background**

For the purpose of this piece, we intend to assess the decisions of the High Court of Singapore (“SGHC”), the Court of Appeal of Singapore (“SGCA”) and the Bombay High Court (“BHC”) in the dispute between Mr Anupam Mittal and the Mauritius-domiciled Westbridge Ventures II Investment Holdings (“Westbridge”) – a private equity fund with a stake in the People Interactive (India) Private Limited (“Company”) which operates the ‘shaadi.com’ platform. The disputes arose out of a shareholders’ agreement (“SHA”) signed between the aforementioned entities and other parties to govern the affairs of the Company. It is relevant for the purpose of the discussion to briefly indicate the flavour of the dispute. Mr Mittal alleged that Westbridge attempted to initiate certain actions which would be detrimental to the affairs of the Company. It goes without

saying that the actions under discussion also appear to have been intended to undermine Mr Mittal's control over the Company.

## **Initial Disagreements**

After the dispute arose, the proverbial first shot was fired by Mr. Mittal before the National Company Law Tribunal, Mumbai (“NCLT”) alleging oppression and mismanagement of the Company by Westbridge.<sup>1</sup> It appears that when this petition was served, Westbridge was caught unawares owing to it being under the impression that any disputes which Mr Mittal may have with it were to be resolved by arbitration before a tribunal to be constituted under the rules of the International Chamber of Commerce (“ICC”) and seated in Singapore.

This understanding was based on the relevant clause of the SHA referring disputes related to the performance of the SHA to arbitration. At this stage, it may be mentioned that an arbitration clause contained in a main contract may see interaction of different jurisdictional laws - for instance the law governing the main contract may belong to country A, the law governing the arbitration agreement itself may be of country B, the law governing the arbitration proceedings would be the law of country C where the arbitration is seated, and the resultant award may require to be enforced in country D. In the instant Mittal-Westbridge dispute, parties were *ad idem* that the law governing the SHA was Indian. It was also beyond doubt that Singapore was envisaged as the seat of the arbitration. Accordingly, courts in Singapore would have supervisory jurisdiction over any arbitral tribunal to be constituted under the SHA. However, there was a disagreement between the parties as to the law of the arbitration agreement. To preface the issue – Mr Mittal

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<sup>1</sup> Company Petition No. 92 of 2021 (“NCLT Petition”), served on Westbridge on 3 May 2021.

argued that the law of the arbitration agreement would be Indian whereas Westbridge believed that Singaporean law would apply. A glance at the relevant clause of the SHA is in order to appreciate the phraseology (or lack thereof) that ignited the disagreement.<sup>2</sup>

## **Proceedings Before the SGHC**

Upon being served the NCLT petition, Westbridge lost no time in approaching the SGHC and prayed for an ex-parte anti-suit injunction that would bar Mr Mittal from pursuing any judicial remedies that seemingly flouted his obligation to arbitrate. It succeeded.<sup>3</sup> The ex-parte injunction was naturally contested by Mr Mittal before the SGHC which, having had the benefit of both parties' arguments, was called upon to determine whether the injunction ought to be vacated or made permanent. In its decision<sup>4</sup>, the SGHC noted that it was essentially being asked to exercise supervisory jurisdiction over an arbitration at the pre-award stage.<sup>5</sup> It observed that while the exercise of such jurisdiction at the post-award stage would be in terms of the law of the seat, there was some

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<sup>2</sup> "20 GOVERNING LAW AND ARBITRATION  
20.1 This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India. In the event of a dispute relating to the management of the Company or relating to any of the matters set out in this Agreement, parties to the dispute shall each appoint one nominee/representative who shall discuss in good faith to resolve the difference. In case the difference is not settled within 30 calendar days, it shall be referred to arbitration in accordance with Clause 20.2 below.

20.2 All such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration before a sole arbitrator to be jointly appointed by the Parties. In the event the Parties are unable to agree on a sole arbitrator, one of the arbitrators shall be appointed jointly by the Founders and the second arbitrator will be appointed by [Westbridge] and the third arbitrator will be appointed by the other two arbitrators jointly. The arbitration proceedings shall be carried out in accordance with the rules laid down by International Chambers of Commerce and the place of arbitration shall be Singapore. The arbitration proceedings shall be conducted in the English language. The parties shall equally share the costs of the arbitrator's fees, but shall bear the costs of their own legal counsel engaged for the purposes of the arbitration. [...]"

<sup>3</sup> Ex parte interim injunction order (HC/ORC 1463/2021) granted by the SGHC against Mr Mittal on 15 March 2021 in HC/SUM 1183/2021.

<sup>4</sup> *Westbridge Ventures II Investment Holdings v Anupam Mittal*, [2021] SGHC 244, Judgment of the High Court of Singapore dated 26 October 2021 ("SGHC Judgment").

<sup>5</sup> SGHC Judgment, ¶¶ 2, 7.

justifiable doubt on which law would apply to such an exercise at the pre-award stage.<sup>6</sup> It also recognised that it was not immediately clear from the SHA what the law of the arbitration agreement was. However, basing itself *inter alia*, on the need for judicial predictability and ‘certainty in law’<sup>7</sup>, it reached the conclusion that the law of the seat was to guide supervisory court proceedings even at the pre-award stage. In doing so, it avoided going into the question of what the law of the arbitration agreement was in the case at hand.

Thus, the SGHC devised for itself the limited task of adjudging whether under Singaporean law it ought to grant an injunction barring Mr Mittal from pursuing remedies apart from the arbitration envisaged in the SHA. Mr Mittal's defence had been that oppression and mismanagement claims are not arbitrable in India and hence any arbitral proceedings could not be an appropriate remedy. However, the SGHC decided to be guided only by what the law of the seat indicated on whether such disputes would be arbitrable in Singapore.<sup>8</sup> It concluded in the positive and made the injunction permanent.

### **Views On the SGHC’s Approach**

One may pause here and appreciate the strings tugging in opposite directions. An Indian party and a Mauritian party decided to refer the disputes in relation to an Indian company to arbitration in Singapore. Out of the entire set of disputes that may arise between them in relation to the company, a small subset is not arbitrable in India. The question then becomes whether by seating that arbitration in Singapore the parties knowingly and consciously chose to overcome the limitations imposed under Indian law on the arbitrability of such a subset. A common explanation

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<sup>6</sup> Ibid, ¶ 8.

<sup>7</sup> Ibid, ¶¶ 48-53

<sup>8</sup> Ibid, ¶ 23.

offered here is that parties often choose a neutral seat as a work around for such restrictions. Essentially, this reading indicates that parties were aware that disputes falling under the category of oppression and mismanagement, while not arbitrable under Indian law, could still be brought under the ambit of arbitration by seating the arbitration in a jurisdiction where these issues are arbitrable. The SGHC considered that Singapore's public policy 'promote[d] or favour[ed] international arbitration'<sup>9</sup>.

The thrust of Mr Mittal's arguments before the SGHC was on the unenforceability of any potential award in India as oppression and mismanagement disputes were not arbitrable in India. This flows from the fact that a foreign arbitral award is not worth the paper it is printed on if it violates the public policy of India. Put differently, an argument was made before the SGHC that the arbitration proceedings which it was being invited to bring under its protective umbrella would serve no practical purpose for the parties involved. It would be a dead-end. However, the SGHC was not persuaded that this argument was a silver bullet for Mr Mittal. It noted that there was nothing unusual in allowing an arbitration which would give rise to an award that would be unenforceable in a particular jurisdiction. Taking a look at the drafting history of the UNCITRAL Model Law (which largely forms the basis of arbitration laws around the world), the SGHC noted that every jurisdiction had been conferred with an 'escape valve' from the obligation to enforce foreign awards, in the form of the 'public policy' exception.<sup>10</sup> However, it saw this as no reason to disturb the arbitration, even going to the extent of terming it a 'speculative' reason.<sup>11</sup> It noted that doing so would amount to a seat court preemptively getting affected by enforcement concerns. The authors respectfully disagree with this approach for reasons to be detailed.

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<sup>9</sup> Ibid, ¶ 54

<sup>10</sup> Ibid, ¶ 87.

<sup>11</sup> Ibid.

It is of great interest that before so doing, the SGHC alluded to a decision of the SGCA in *Larsen Oil*<sup>12</sup> where in relation to an arbitration covered by the (Singapore) Arbitration Act 2001 (as against an international commercial arbitration such as Mittal-Westbridge to which Singapore's International Arbitration Act 1994 applies), the SGCA had presciently observed that 'arbitration is not an end in itself'.<sup>13</sup> The SGCA in *Larsen Oil* had cautioned that an arbitral award arising out of a non-arbitral claim would be a *brutum fulmen* (literally, a harmless thunderbolt; or an empty threat<sup>14</sup>). Apart from the vivid imagery, the SGCA had also cautioned that such an exercise would be 'an utter waste of time for the parties to incur time and cost'. However, in the Mittal-Westbridge dispute, despite observing that *Larsen Oil* would apply to the arbitration at hand, its stricture was considered to be attracted only when courts of a particular country would later find themselves in a position to set aside an award flowing from an arbitration seated in the same country.<sup>15</sup> Ultimately, the SGHC saw it fit to grant a permanent anti-suit injunction against Mr Mittal restraining him from continuing with or commencing any proceedings in India.<sup>16</sup>

## **Status Of Indian Proceedings**

Before delving into Mr Mittal's appeal before the SGCA, it would be pertinent to look at the scene of the play between the dramatis personae in Mumbai. After filing its NCLT petition and receiving the ex-parte anti-suit injunction, Mr Mittal had also filed a suit in the BHC praying for a declaration that oppression and mismanagement claims could only be adjudicated by the NCLT and could not be

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<sup>12</sup> *Larsen Oil and Gas Pte Ltd v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*, [2011] 3 SLR 414.

<sup>13</sup> SGHC Judgment, ¶ 86.

<sup>14</sup> 'Brutum Fulmen' <<https://www.merriam-webster.com/dictionary/brutum+fulmen>> accessed 26 January 2024.

<sup>15</sup> SGHC Judgment, ¶ 86.

<sup>16</sup> *Ibid*, ¶ 93.

subjected to an arbitration.<sup>17</sup> He also prayed for an injunction against Westbridge enforcing its anti-suit injunction against him, and further for restraining Westbridge from continuing with proceedings before the SGHC.<sup>18</sup> At the time of SGHC Judgment, the BHC had not issued any ruling on the suit before it.

## **Appeal In Singapore**

Once the matters reached the SGCA, the arguments of the parties largely mirrored those submissions before the SGHC. The SGCA reached the same conclusion as the SGHC but for different reasons. To begin with, it held that the law of the arbitration agreement would be a more proper guide to see whether the issue was arbitrable.<sup>19</sup> It was then incumbent upon it to decide whether Indian law or Singaporean law governed the arbitration agreement in question. To do this it relied on the three-pronged test developed by it previously in *BCY v BCZ*.<sup>20</sup> The test requires a court to first assess whether the parties have expressly provided for the law which covers the arbitration agreement. It found that to not be the case.<sup>21</sup> Secondly, the implied choice of the parties needs to be looked at and thirdly, the law having the closest connection to the arbitration agreement has to be considered. The SGCA noted the ‘general rule’ that the choice of law for the main contract often was an implied indicator of the law which should govern the arbitration agreement.<sup>22</sup> However, it found that the arbitration agreement before it indicated parties’ intention to arbitrate and subjecting it to Indian law would severely curtail the ability of the parties given that the main contract in question was a SHA and it was

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<sup>17</sup> Suit No. 7816 of 2021, Bombay High Court (“BHC Suit”).

<sup>18</sup> *Ibid*, ¶ 15.

<sup>19</sup> *Anupam Mittal v Westbridge Ventures II Investment Holdings*, [2023] SGCA 1, Civil Appeal No. 64 of 2021, Judgment of the Singapore Court of Appeal dated 6 January 2023 (“SGCA Judgment”), ¶¶ 44, 45, 48, 49, 55.

<sup>20</sup> *BCY v BCZ*, [2017] 3 SLR 357.

<sup>21</sup> SGCA Judgment, ¶¶ 63, 66.

<sup>22</sup> *Ibid*, ¶ 67.

likely that a dispute that amounted to oppression and mismanagement could arise.<sup>23</sup> The SGCA opined that the parties could not have intended for a carve-out of such disputes from their agreement to arbitrate as the same leaves very little to be arbitrated.

A look is also in order on the judicial inspiration behind the reasoning adopted by the SGCA. The same lies in the Court of Appeal of England and Wales (“ECA”) decision in *Sulamerica*.<sup>24</sup> In this case, the contract was governed by Brazilian law and the arbitration was based in London. There was a lack of clarity on which of the two laws governed the arbitration agreement. The ECA noted that the very act of incorporating an arbitration agreement in the main contract signified the parties’ intention to arbitrate. Since Brazilian law had a provision where arbitration could only be commenced by the consent of both parties (which is typically not the case in arbitrations as they can be initiated by one party and the other party has to defend the proceeding or risk the same being held ex-parte), the ECA held that subjecting the arbitration agreement to Brazilian law would undo the very existence of the arbitration agreement. Thus, per the ECA, it could not have been the parties’ intent to subject the arbitration agreement to Brazilian law and it held English law to be the law governing the arbitration agreement.

It is now worthwhile to study the SGCA’s well-informed observations on the status of Indian judicial precedents on enforcement of foreign awards. It appears that while arguments were not advanced in extenso before the SGCA on whether such an award would be enforceable in India, the SGCA itself takes note<sup>25</sup> of the decision of the Indian Supreme Court in *Vijay Karia* where the court held that arbitral tribunals ruling on issues that are not

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<sup>23</sup> Ibid, ¶¶ 69, 70, 73.

<sup>24</sup> *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102 (“Sulamerica”).

<sup>25</sup> SGCA Judgment, ¶ 105.

arbitrable under Indian law essentially act without jurisdiction and that such awards have to be mandatorily ignored by Indian courts.<sup>26</sup> There is no discretion in an Indian Court to enforce such an award. Quite perplexingly, even after acknowledging this ground reality and satisfying itself that no discretion would lie in an Indian Court to enforce and award flowing from a potential Mittal-Westbridge arbitration if the Indian courts considered the same to have been in an issue concerning oppression and mismanagement of the Company, the SGCA went on to consider the propriety of allowing the arbitration to continue and the anti-suit injunction to stand. It noted that it was being pulled in opposite directions as on one hand it appeared that parties had an obligation to arbitrate disputes relating to the management of the Company but on the other, it was clear that such an award would be unenforceable.<sup>27</sup> It then went on to sanction a dead-end arbitration.

### **Thoughts On the SGCA's Approach**

It is respectfully submitted that the circularity of the *Sulamerica* argument when applied to the present facts makes its application unsustainable. There is nothing contemporaneous in the instant case to suggest that parties chose an arbitral seat in Singapore to weasel out of the non-arbitrability restrictions in India. It is equally reasonable to think that parties were aware of the restrictions on the right to arbitrate and chose Singapore only to facilitate faster reference to arbitration in case of an impasse.

To our mind, the SGCA ignored obvious limitations against exporting ECA's rationale in *Sulamerica* to the case before it. In *Sulamerica*, holding Brazilian law as the law of the arbitration agreement would have rendered a death

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<sup>26</sup> *Vijay Karia and others v Prysmian Cavi E Sistemi SRL and others* (2020) 11 SCC 1.

<sup>27</sup> SGCA Judgment, ¶ 106.

blow to the arbitration agreement. In the Mittal-Westbridge dispute, the consequences were not as dire. Apart from oppression and mismanagement, the remainder of inter-  
corporate issues could be arbitrated as per the SHA. The authors submit that this makes the SGCA's decision disproportionate. At this juncture, we do recognise the fundamental issue troubling the SGCA. Could it not be possible that Mr Mittal attempted to weasel out of the arbitration agreement by colouring all his disputes to make them appear as constituting oppression and mismanagement under Indian law? That in fact was Westbridge's argument both before the SGHC and later before the SGCA. It argued that the NCLT petition was dressed up to look like an oppression and mismanagement case when it was a plain shareholders' dispute that ought to be relegated to arbitration.<sup>28</sup> This fact appears to have weighed heavily with the SGCA.

The authors find it curious that a jurisdiction which prides itself upon its pro-arbitration stance would allow arbitration to run amok and become an end in itself. We fight back a pessimistic view that arbitration as a way of dispute resolution could have captured any judiciary in such a thrall that it would turn a blind eye to dead-end arbitrations that potentially benefit all stakeholders except the parties involved. It is true as the SGCA notes that while the arbitration may result in an unenforceable award, the very process could be beneficial to the parties by helping them test the strength of their legal arguments. What the SGCA leaves unsaid is that the process could perhaps bring the parties to the negotiating table and set the stage for a settlement of the dispute between them. That is indeed a noble aim. However, one wonders whether the SGCA would take the same charitable view in a Singapore-seated arbitration between Singapore-domiciled parties on an issue that is clearly non-arbitrable under Singaporean law. Of course, there would be clear restrictions under

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<sup>28</sup> SGCA Judgment, ¶ 21.

Singaporean law which would likely not allow the SGCA to exercise such discretion but if one is to hypothesize for a moment, one would perhaps be faced with the reality that a non-arbitrable issue would not be allowed to be arbitrated in a domestic arbitration in Singapore with the stated aim of allowing the parties to test their arguments. In fact, there is little need for conjecture as the SGCA's decision in *Larsen Oil* indicates which way those winds would blow.

The authors do recognise that principally there is nothing fundamentally flawed with the principle behind the SGCA's decision and there are a wide variety of situations where the potential unenforceability in a jurisdiction ought not to prevent an arbitration from happening as there may be multiple avenues and jurisdictions where enforcement of the award could be sought even if it is not allowed in the home state of one of the parties. In a dispute on the management of a company, for arbitration to be an effective form of dispute resolution, it stands to reason that the award would have to be enforceable in that jurisdiction. Without that, it only remains an end in itself.

## **Back To Bombay**

While the SGCA upheld the anti-suit injunction, Mr Mittal chose to ignore it and pursued the matter before the BHC. He contended before the BHC that an award born out of the arbitration in Singapore even if it favoured him would be a dead letter as he could not enforce it in India. He demonstrated to the BHC that if the anti-suit injunction granted by the Singaporean courts was to be honoured, he would at best be left with an unenforceable award, thereby rendering him remediless.<sup>29</sup> The BHC agreed. Before so doing, the BHC undertook a prima facie review of the

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<sup>29</sup> *Anupam Mittal v. People Interactive (India) Pvt. Ltd. & Ors*, IA No. 1010/2021 in Suit No. 95/2021, Judgment dated 11 September 2023 ("BHC Judgment"), ¶ 2.

claims made by Mr Mittal before the NCLT and concluded that oppression and mismanagement could not be completely ruled out.<sup>30</sup> The BHC observed the issue would most likely not be arbitrable in India and the resultant award would not be enforceable.<sup>31</sup> It is important to note that the BHC also refused to undertake a deeper enquiry into the allegations that the NCLT petition was dressed up. It refused to step on the toes of the NCLT which under the (Indian) Companies Act, 2013 has the sole prerogative to decide on oppression and mismanagement claims.<sup>32</sup> Thus, the BHC was comfortable in granting a temporary injunction restraining enforcement at Westbridge's behest of the permanent anti-suit injunction affirmed by the SGCA.<sup>33</sup> the relief prayed for in the form of an anti-anti-suit injunction, or more simply put an anti-enforcement injunction. It may be of interest that the BHC has noted the SGCA's observations on *Vijay Karia* and its conclusion that the resultant foreign award would be unenforceable in India,<sup>34</sup> without commenting further, understandably in light of judicial propriety and comity.

## Parting Thoughts

It is also pertinent to state that pursuant to the BHC's order, the NCLT was invited to issue an anti-arbitration injunction to which, in the authors' respectful view, it assented<sup>35</sup> more laconically than it ought to have, after noting that Westbridge had the liberty to seek the transfer

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<sup>30</sup> BHC Judgment, ¶ 63, 64.

<sup>31</sup> *Ibid*, ¶¶ 50, 53.

<sup>32</sup> Section 430 of the Companies Act, 2013: "430. Civil Court not to have jurisdiction. - No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under his Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."

<sup>33</sup> BHC Judgment, ¶ 83.

<sup>34</sup> *Ibid*, ¶¶ 77, 78.

<sup>35</sup> *Anupam Mittal v People Interactive (India) Private Limited and Others*, CA 392/2023 in CP/92(MB)2021, Order of the National Company Law Tribunal, Mumbai dated 15 September 2023.

of the proceedings before the NCLT to arbitration.<sup>36</sup> Here, the authors do not intend to delve into the question of whether a tribunal has inherent powers of a similar nature and amplitude as for instance, a High Court in India, to issue an injunction against a foreign-seated arbitration. It may be noted that the issue remains unsettled in most major jurisdictions.

Going back to the philosophical issue laid bare by the approach of the Singaporean courts on whether arbitration should be in end in itself, the authors note that arbitration is prone to bouts of legitimacy crises. Accordingly, a pro-arbitration approach would not necessarily mean a perpetual light-touch strategy even in light of serious doubts as to the arbitration's propriety. Some judicial gate-keeping would be advisable to ensure that the forest is not missed for the trees.

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<sup>36</sup> Section 45 of the (Indian) Arbitration & Conciliation Act, 1996: "Power of judicial authority to refer parties to arbitration: Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed."

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